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Supreme Court, U.S.
FILED

07-291 AUG 30 2007

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No. ____

In the Supreme Court of the United States

STANDING TOGETHER TO OPPOSE PARTIAL-BIRTH-ABORTION,

Petitioner,

v.

NORTHLAND FAMILY PLANNING CLINIC, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 30, 2007

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QUESTION PRESENTED

This Court should grant review to resolve the split in the circuit courts regarding the "interest" sufficient to intervene as of right under Federal Rule of Civil Procedure 24(a)(2). At present, there is no clear definition of the nature of the interest required for intervention. Moreover, there is conflict in the courts regarding the relationship between the "interest" required for Rule 24 and the interest required for Article III standing.

Petitioner Standing Together To Oppose Partial-birth-abortion, a ballot question committee formed by Right to Life of Michigan, Inc., seeks intervention to defend the constitutionality of the Legal Birth Definition Act, which was proposed by initiative petition pursuant to Article 2, § 9 of the Michigan Constitution.

Petitioner, the primary sponsor and supporter of this legislation, initiated the petition process, drafted the language of the petition, presented the petition to the Secretary of State and the Board of State Canvassers for approval, and acquired nearly 460,000 signatures to support it. Petitioner did not simply endorse or lobby for the Act; rather, it was responsible for ensuring that the legislation was enacted.

Petitioner timely filed a motion to intervene in defense of the Act pursuant to Rule 24. This motion was denied in the district court, and the denial was affirmed by the Sixth Circuit, which held that Petitioner lacked a sufficient "interest" to intervene.

1. Whether Petitioner, a public interest group, has a sufficient "interest" to intervene in an action challenging legislation it sponsored and supported.

PARTIES TO THE PROCEEDING

The Petitioner is Standing Together to Oppose Partial-birth-abortion ("Petitioner"), a proposed intervenor in the action.

The Respondent plaintiffs in the action are Northland Family Planning Clinic, Inc.; Northland Family Planning Clinic, Inc.—West; Northland Family Planning Clinic, Inc.—East; Summit Medical Center, Inc.; Planned Parenthood of Mid-Michigan Alliance; Planned Parenthood of South Central Michigan; Stanley M. Berry; Timothy R.B. Johnson; Karoline S. Puder; and Ronald C. Strickler ("Plaintiffs").

The Respondent defendants in the action are Michael A. Cox, Attorney General of the State of Michigan ("Attorney General"); and Kim L. Worthy, Prosecuting Attorney for Wayne County (collectively referred to as "Defendants").[1]

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[1] Article III standing is not an issue here because the Attorney General is seeking review of the decision below. *See Diamond v. Charles*, 476 U.S. 54, 64 (1986).

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The panel's opinion, App. 1a, appears at 487 F.3d 323. The district court's opinion, App. 42a, appears at 394 F. Supp. 2d 978.

JURISDICTION

The opinion of the panel was issued on June 4, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL LAW PROVISION INVOLVED

Rule 24 of the Federal Rules of Civil Procedure states in relevant part:

> (a) **Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

The Legal Birth Definition Act was proposed by initiative petition pursuant to Article 2, § 9 of the Michigan Constitution. Petitioner, a ballot question committee formed by Right to Life of Michigan, Inc. and registered with the Michigan Department of State pursuant to the Michigan

Campaign Finance Act, played a crucial role in enacting this citizen-initiated legislation. *See* App. 1a, 5a, 43a-44a, 66a.

In October 2003, Michigan Governor Jennifer Granholm vetoed a bill passed by the Michigan legislature to ban partial-birth abortion. In response, in January 2004, the citizens of Michigan, through the efforts of Petitioner, initiated legislation pursuant to Article 2, § 9 of the Michigan Constitution that would be immune from future vetoes by the governor. Petitioner organized and conducted one of the most successful petition drives in recent Michigan history. The campaign to initiate legislation to ban the controversial abortion procedure turned in nearly 460,000 signatures to state election officials, which was 200,000 more than needed to adopt the legislation without the governor's approval. The Act was subsequently passed by a simple majority vote in both the Michigan House (74 to 28) and Senate (23 to 12). *See generally* App. 66a.

The Legal Birth Definition Act states that "[a] perinate shall be considered a legally born person for all purposes under the law." M.C.L. § 333.1083. App. 74a. According to the Act, a "'[p]erinate' means a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body." M.C.L. § 333.1085. App. 75a. The Act was based on the following findings:

> (a) That in *Roe v. Wade* the United States supreme court declared that an unborn child is not a person as understood and protected by the constitution, but any born child is a legal person with full constitutional and legal rights.

(b) That in *Roe v. Wade* the United States supreme court made no effort to define birth or place any restrictions on the states in defining when a human being is considered born for legal purposes.

(c) That when any portion of a human being has been vaginally delivered outside his or her mother's body, that portion of the body can only be described as born and the state has a rational basis for defining that human being as born and as a legal person.

(d) That the state has a compelling interest in protecting the life of a born person.

M.C.L. § 333.1082. App. 76a.

Through this legislation, Petitioner and the people of Michigan were asserting their significant and substantial interest in protecting and preserving human life. App. 67a.

On March 1, 2005, Plaintiffs filed a complaint, challenging the constitutionality of the Act. Plaintiffs sought declaratory and injunctive relief, claiming that the Act violated various liberty interests protected by the Fourteenth Amendment to the United States Constitution. Plaintiffs also filed a motion for preliminary injunction. App. 4a.

On March 14, 2005, Plaintiffs and the Attorney General stipulated to a Temporary Restraining Order ("TRO"), enjoining the enforcement of the Act until the resolution of Plaintiffs' motion for preliminary injunction. App. 4a.

On March 16, 2005, Petitioner filed a motion to intervene as a defendant.[2] This motion was "accompanied by a pleading setting forth the claim or defense for which intervention is sought" pursuant to Federal Rule of Civil Procedure 24(c). The accompanying pleading was Petitioner's "Answer in Intervention," the only filing permitted under the rules until intervention is granted. *See* Fed. R. Civ. P. 24(c); App. 65a-73a.

In its Answer, Petitioner denied much of the factual basis for Plaintiffs' claims. For example, Petitioner contested the following assertions:

- That the Act prohibited suction curettage, D&E, and induction;

- That the Act criminalized a broad range of procedures and actions physicians regularly perform during common methods of pre-viability abortions, as well as certain obstetrical procedures;

- That physicians would have to "guess as to what procedures or actions are encompassed by the Act";

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[2] Petitioner sought intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b)(2). Both were denied. It should be noted that the confusion in the circuit courts regarding the "interest" sufficient to intervene as of right and the interest required for Article III standing also exists in cases brought under Rule 24(b)(2). *See* Amy M. Gardner, Comment, *An Attempt to Intervene in the Confusion: Standing Requirements for Rule 24 Intervenors*, 69 U. Chi. L. Rev. 681 (2002). Therefore, granting this petition could help resolve issues related to permissive intervention as well.

- That the Act endangers the lives and health of pregnant women;

- That physicians cannot know what the Act means by its requirement that the physician make "every reasonable effort" to preserve the life of both the mother and the perinate when taking actions necess ry to save the life of the mother; and

- That the Act fails to give adequate notice to physicians of what procedures or actions will subject them to liability. App. 65a-72a; *see generally* App. 35a.

The Attorney General moved to dismiss the complaint for failure to state a claim. Consequently, he did not submit affidavits or declarations in opposition to Plaintiffs' factual assertions, nor did he seek discovery to test their veracity. As a result, Plaintiffs' assertions, which ultimately served as the factual basis for the final decision in this case, remained uncontested in the proceedings below. *See* App. 4a, 5a-8a, 19a, 51a-57a.

Had Petitioner been permitted to intervene, it would have provided a more complete factual record, including expert testimony from qualified physicians and other medical personnel, demonstrating the inaccuracies of Plaintiffs' allegations. Moreover, Petitioner, the organization largely responsible for this citizen-initiated legislation, would have provided an important perspective as to the meaning and, therefore, the constitutionality of the Act. *See* App. 35a.

On September 15, 2005, the district court entered an order denying the Attorney General's motion to dismiss, granting a motion agreed upon by Plaintiffs and the Attorney General to consolidate Plaintiffs' motion for preliminary injunction with

a final hearing on the merits, denying Petitioner's motion to intervene and request to file a brief on the merits, and declaring the Act unconstitutional. App. 42a-62a.

Final judgment was entered in favor of Plaintiffs and against Defendants, disposing of all parties' claims. App. 63a.

On October 7, 2005, Petitioner and the Attorney General filed timely notices of appeal. On June 4, 2007, the court of appeals affirmed. App. 41a.

In its decision, the Sixth Circuit acknowledged that a remand would be fitting if the district court had improperly denied Petitioner's motion to intervene. The court stated, "[I]n light of STTOP's argument that it would have argued the case and developed the factual record differently than the state, a remand might be necessary to provide STTOP such an opportunity if the motion to intervene was incorrectly denied." App. 35a.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT REGARDING THE "INTEREST" REQUIRED FOR INTERVENTION AS OF RIGHT UNDER FED. R. CIV. P. 24.

A. THERE IS A CIRCUIT SPLIT ON WHETHER A PUBLIC INTEREST GROUP IS ENTITLED TO INTERVENE IN AN ACTION CHALLENGING A MEASURE IT HAS SUPPORTED.

There is a recognized split of authority in the circuit courts regarding the interest necessary for a proposed

intervenor to intervene as of right in a federal action pursuant to Federal Rule of Civil Procedure 24. This is particularly true for cases in which a public interest group seeks to intervene in an action challenging legislation that it supported. In this case, the "interest" is heightened since Petitioner did more than simply endorse or lobby for legislation; it assumed the initial role of introducing the legislation through the arduous petition process.[3]

Some circuits, such as the Ninth Circuit, take a very liberal approach to intervention. For example, the Ninth Circuit has adopted a rule that "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (concluding that the district court properly granted intervention to environmental groups in an action challenging the final rule listing the snail as an endangered species under the Endangered Species Act); *Washington State Bldg. & Constr. Trades v. Spellman*, 684 F.2d 627 (9th Cir. 1982) (holding that a public interest group was entitled as a matter of right to intervene in an action challenging the legality of a measure which it had sponsored and supported); *see also State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (holding that the National Organization for Women had a right to

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[3] In *Doe v. Department of Soc. Serv.*, 439 Mich. 650 (1992), a case challenging a Michigan statute that prohibited the use of public funds to pay for an abortion unless the abortion was necessary to save the mother's life, Committee to End Tax Funded Abortions, a ballot question committee formed by Right to Life of Michigan, Inc., was permitted to intervene as a defendant. The challenged statute, similar to the legislation at issue here, was the result of an initiative petition sponsored and supported by the ballot question committee.

intervene in a suit challenging procedures for ratification of the proposed Equal Rights Amendment to the U.S. Constitution, a cause which that organization had championed).

The Ninth Circuit applies this liberal approach to intervention in other cases as well, particularly those involving aesthetic and environmental issues. *See, e.g., Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (holding that a national, nonprofit organization devoted to the protection of birds and other animals was entitled to intervene as a matter of right in a suit challenging the creation of a "birds of prey" conservation area in Idaho).

The Tenth Circuit has also broadly construed the interest sufficient to intervene as a matter of right. *See National Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381, 384 (10th Cir. 1977) ("Our court has tended to follow a somewhat liberal line in allowing intervention."). For example, in *Coalition of Arizona/New Mexico Counties v. Department of the Interior*, 100 F.3d 837 (10th Cir. 1996), the court held that a proposed intervenor, who was a photographer and self-proclaimed amateur biologist and naturalist with an interest in preserving the Mexican spotted owl, could intervene as of right in an action challenging the decision to protect the owl under the Endangered Species Act. Accordingly, the Tenth Circuit views "the 'interest' test [as] primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* at 841 (internal quotations and citation omitted); *see also San Juan County v. United States*, 420 F.3d 1197, 1209 (10th Cir. 2005) ("It is not necessary, however, for a party intervening as a matter of right to be able to assert its own cause of action.").

In comparison with those circuits that liberally construe Rule 24 in favor of intervention, the Seventh Circuit takes a very narrow view of the "interest" necessary to support intervention as of right. In *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), for example, the court held that "[a] proposed intervenor must demonstrate a direct, significant and legally protectable interest in the property at issue in the law suit." The court stated that the "interest" in the action "must be so direct that the applicant would have a right to maintain a claim for the relief sought." *Id.* In *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985), the court emphasized its strict view of the "interest" necessary to intervene, holding that this interest "must be greater than the interest sufficient to satisfy the standing requirement."

Accordingly, the Seventh Circuit rejects the view that a public interest group that is involved in the process leading to the adoption of legislation has a sufficient interest to intervene in an action to defend that legislation. *See Keith*, 764 F.2d at 1269-70. The Seventh Circuit also rejects the argument that aesthetic and environmental interests constitute a "direct, substantial, and legally protectable" interest sufficient to justify intervention, *36.96 Acres of Land*, 754 F.2d at 859, contrary to the Ninth and Tenth Circuits. And the Seventh Circuit holds that the "interest" necessary for intervention is greater than the interest necessary to confer standing. *Id.* As noted further below, this holding is at odds with several other circuits.

The Sixth Circuit claims to have "opted for a rather expansive notion of the interest sufficient to invoke intervention of right." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]his court has acknowledged that 'interest' is to be construed

liberally."). In fact, the court "noted that an intervenor need not have the same standing necessary to initiate a lawsuit, and cited with approval decisions of other courts 'reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest.'" *Miller*, 103 F.3d at 1245 (internal citation omitted) (emphasis added).

Accordingly, the Sixth Circuit has cited with approval the broad rule adopted by the Ninth Circuit "that a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation." *Id.* at 1245-46 (citing *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397-98; *Sagebrush Rebellion, Inc.*, 713 F.2d at 527-28; *Freeman*, 625 F.2d at 886). However, it now appears from the panel's decision below that the court has adopted a less "liberal" view of intervention, making arguments that more closely equate "interest" under Rule 24 with the interest required for standing. *See* App. 37a (finding no legal interest in the action since Petitioner "is not itself regulated by any of the statutory provisions at issue here").

As a consequence of this circuit split, one's ability to intervene in an action tends to be less dependent upon the Federal Rules of Civil Procedure or the Constitution than it is upon the circuit in which the lawsuit is brought. This anomaly has the deleterious effect of causing inconsistent results, creating confusion for the courts and the litigants, and encouraging forum shopping by plaintiffs who anticipate the likelihood that a third party will intervene. A circuit split in an area as fundamental as whether a party may participate in

an action in which it has an interest is one that this Court should resolve by granting review of this case.[4]

B. THERE IS CONFUSION AND A CIRCUIT SPLIT REGARDING THE RELATIONSHIP BETWEEN RULE 24 AND ARTICLE III STANDING.

The relationship between the "interest" required to satisfy intervention under Rule 24 and the interest required to satisfy standing under Article III are often conflated, leading to contradictory results in the circuit courts.

The Eighth and D.C. Circuits, for example, have held that an "interest" sufficient to satisfy Article III standing is required to intervene. *Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Building & Const. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994); *see also*

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[4] In addition to the split over the "interest" requirement of Rule 24, the circuit courts also apply different standards for determining whether a proposed intervenor's interests are "adequately represented by existing parties." *See* Fed. R. Civ. P. 24(a)(2). For example, the Sixth Circuit "has declined to endorse a higher standard for inadequacy when a government entity is involved." *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999). In comparison, the Seventh Circuit holds that "[a]dequacy can be presumed when the party on whose behalf the applicant seeks intervention is a governmental body or officer charged by law with representing the interests of the proposed intervenor." *Keith*, 764 F.2d at 1270. Petitioner contends that the Sixth Circuit has the better view, particularly in cases such as this, because the sponsor of a successful ballot initiative should not be forced to rely on representation by government officials to protect its interests when the very purpose of the initiative was to overcome the lack of responsiveness of the public officials to the public will in the first instance.

Southern Christian Leadership Conference v. Kelley, 747 F.2d 777, 779 (8th Cir. 1984) (equating Rule 24 "interest" with interest required for standing under Article III). The Eleventh Circuit has stated that while Article III standing is not required, it is "relevant" to identifying the "interest" required to satisfy Rule 24. *Chiles v. Thornburgh*, 865 F.2d 1197, 1212-13 (11th Cir. 1989). The Second, Fifth, Sixth, and Ninth Circuits have all concluded that standing is not required for intervention under Rule 24. *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978); *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991). And, as noted previously, the Seventh Circuit maintains that Rule 24 requires an "interest" greater than the interest necessary to confer standing. *36.96 Acres of Land*, 754 F.2d at 859.

It is evident from these conflicting decisions that the "interest" required by Rule 24 has evaded a precise definition that is generally accepted by the lower federal courts, causing significant confusion between the Rule 24 "interest" requirement and the interest required for standing under Article III.

Arguably, this Court's decision in *Diamond v. Charles*, 476 U.S. 54 (1986) has contributed to this confusion. In *Diamond*, the Court stated,

> This Court has recognized that certain public concerns may constitute an adequate "interest" within the meaning of Federal Rule of Civil Procedure 24(a)(2) . . . and has held that an interest under Rule 24(a)(2), which provides for intervention as of right, requires a "significantly protectable interest." However, the

> precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals. We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III.

Id. at 68-69 (citations omitted).

Of interest here is the fact that the conflicting cases generally struggle with defining Rule 24's "interest" requirement and not the Article III standing requirements. *See also* 7C Wright, Miller, and Kane, *Federal Practice & Procedure: Civil 2d* § 1908 (2d. ed. 1986) at 263 ("There is not as yet any clear definition, either from the Supreme Court or from the lower courts, of the nature of the 'interest relating to the property or transaction which is the subject of the action' that is required for intervention of right.").

In sum, this Court should grant review of this case to provide a clear definition of the nature of the interest that is required for intervention and to resolve the conflict between the "interest" required to intervene and the interest required for Article III standing.

II. THE HOLDING IN THE CASE BELOW CREATES AN ANOMALOUS, IF NOT TRAGICALLY IRONIC, RESULT REGARDING THE "INTEREST" NECESSARY TO ALLOW PUBLIC INTEREST GROUPS TO INTERVENE.

Some circuit courts have permitted groups and individuals to intervene to protect their interests in the preservation and protection of "birds of prey," *see Sagebrush Rebellion, Inc.*,

713 F.2d at 527, the Mexican spotted owl. *see Coalition of Arizona/New Mexico Counties*, 100 F.3d at 837, and even the snail, *see Idaho Farm Bureau Fed'n*, 58 F.3d at 1397. Consequently, one should expect the circuit courts to acknowledge a proposed intervenor's interest in the preservation and protection of human life, which is at least as "significant" and "substantial" as an environmental group's interest in the preservation and protection of a snail. Unfortunately, that was not the case here.

In *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007), this Court reaffirmed the people's "legitimate and substantial interest in preserving and promoting fetal life." *Id.* at 1626. The Court also affirmed the right of the people to enact legislation that draws a clear line between abortion and infanticide, *id.* at 1633-34, as Petitioner and the people of Michigan have done here through the Legal Birth Definition Act.

In sum, today it cannot be gainsaid that the preservation and protection of human life is a significant public interest. Consequently, it is an interest that should satisfy the "interest" requirement of Rule 24. *See, e.g., Diamond*, 476 U.S. at 68 (recognizing that "certain public concerns may constitute an adequate 'interest' within the meaning of Federal Rule of Civil Procedure 24(a)(2)").

CONCLUSION

The circuit courts are split on the issue of whether a public interest group responsible for enacting legislation has a sufficient interest to intervene as of right in an action challenging the legislation. Essentially, the circuit courts disagree on the scope and application of Rule 24, particularly with regard to the "interest" required for intervention. Consequently, this Court should grant review of this case in

order to clarify the standard for intervention so as to secure and maintain uniformity of decisions on this important issue of federal law.

Upon review, this Court should reverse the denial of intervention and remand to provide Petitioner the opportunity to fully develop the factual record and to argue the merits of the case.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-2417/2418

[Filed June 4, 2007]
As Amended June 22, 2007

NORTHLAND FAMILY PLANNING CLINIC, INC.; NORTHLAND FAMILY PLANNING CLINIC, INC. - WEST; NORTHLAND FAMILY PLANNING CLINIC, INC. - EAST; SUMMIT MEDICAL CENTER, INC.; PLANNED PARENTHOOD OF MID-MICHIGAN ALLIANCE; PLANNED PARENTHOOD OF SOUTH CENTRAL MICHIGAN; STANLEY M. BERRY; TIMOTHY R.B. JOHNSON; KAROLINE S. PUDER; RONALD C. STRICKLER,
Plaintiffs-Appellees,

v.

MICHAEL A. COX, Attorney General of the State of Michigan,
Defendant-Appellant (05-2418),

KIM L. WORTHY, Prosecuting Attorney for Wayne County,
Defendant,

STANDING TOGETHER TO OPPOSE PARTIAL-BIRTH-ABORTION,
Proposed Intervenor-Appellant (05-2417).

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 05-70779. Denise Page Hood, District Judge.

Before: MARTIN and COOK, Circuit Judges; BUNNING, District Judge.*

OPINION

BOYCE F. MARTIN, JR., Circuit Judge. The Michigan Attorney General appeals the district court's decision declaring unconstitutional a state law that regulates abortion methods. Because we find that Michigan's law fails to comply with the explicit limitations that the Supreme Court has established for statutes regulating abortion, we agree with the district court's disposition, and affirm.

I.

In 2004, after a proposal by a citizen initiative petition, the Michigan Legislature passed the Legal Birth Definition Act. The purpose of the Act was to prohibit the practice

* The Honorable David L. Bunning, United States District Judge for the Eastern District of Kentucky, sitting by designation.

colloquially referred to as partial-birth abortion. The Act does not on its own terms ban any specific type of abortion procedure. Instead it creates a protected legal status for a partially-delivered fetus that it terms a "perinate." Mich. Comp. Laws § 333.1083(1) ("A perinate shall be considered a legally born person for all purposes under the law."). A perinate is defined by the Act as "a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body." Mich. Comp. Laws § 333.1085(d). The Act provides civil and criminal immunity for physicians who perform procedures that result in the injury or death of a perinate where the perinate is "expelled from the mother's body as a result of a spontaneous abortion," as well as in circumstances where:

> in that physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary in either of the following circumstances:
>
> (i) To save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate.
>
> (ii) To avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed.

Mich. Comp. Laws § 333.1083. As the state acknowledges, "the practical effect of the [Act] on abortion procedures is that any physician who performs an abortion that results in the injury or death of a 'perinate' would be subject to criminal

prosecution unless excused by the life or health exceptions." Appellant's Br. at 6.

The plaintiffs in this case – six health care facilities and four obstetrician-gynecologists – filed suit on March 1, 2005, prior to the March 30, 2005 effective date of the Act. They sought declaratory and permanent injunctive relief, and moved simultaneously for a preliminary injunction to prevent enforcement of the Act during the pendency of the litigation. Two weeks after the complaint was filed, the parties stipulated to a Temporary Restraining Order until the district court could rule on the motion for preliminary injunction. The Michigan Attorney General subsequently issued an opinion purporting to limit the scope of the Act. The opinion provides that in light of federal case law, the Act "has the effect of banning, with certain exceptions, those dilation and extraction (D&X) abortion procedures that require the killing of a 'perinate' as defined in the Act. The [Act] does not have the effect of banning the dilation and evacuation (D&E) procedures." A.G. Op. at 11 (citing *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436 (6th Cir. 2003)). After the issuance of the Attorney General's opinion, Michigan filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). The state argued that based on the substance of the opinion and the Attorney General's authority to bind the state's district attorneys, the statute could not be said to prohibit any constitutionally protected methods of abortion, and that the plaintiffs' case was therefore moot.

With the consent of the parties, the district court consolidated the proceedings regarding the motions for preliminary and permanent injunctive relief. It issued an opinion on September 12, 2005 in which it denied the state's motion to dismiss, reasoning that an Attorney General's

opinion "does not constitute a ruling on the constitutionality of the Act." *Northland Family Planning Clinic, Inc. v. Cox*, 394 F. Supp. 2d 978, 985 (E.D. Mich. 2005). It also declared the statute unconstitutional because it imposed an undue burden on a woman's right to terminate her pregnancy by prohibiting the D&E procedure, because it failed to adequately protect the health of the woman, and because it was void for vagueness due to its confusing language. *Id.* at 985-89. The district court's order did not provide any injunctive relief, but simply declared the Act unconstitutional. The district court also denied a motion to intervene filed by a group called "Standing Together to Oppose Partial-Birth-Abortion" or "STTOP." *See id.* at 989-90. STTOP is a ballot-question committee of Right to Life of Michigan, Inc., which was formed to promote the passage of the Act.

The Attorney General and STTOP both appeal from the district court's order.

II.

A full understanding of the legal issues presented by this appeal requires some background on the abortion procedures in question. *See Stenberg*, 530 U.S. at 922 ("[O]ur discussion might seem clinically cold or callous to some, perhaps horrifying to others. There is no alternative way, however, to acquaint the reader with the technical distinctions among different abortions methods and related factual matters, upon which the outcome of this case depends.").

During the first trimester, abortions are typically performed by "suction curettage," where the doctor empties the uterus with suction by dilating the cervix, inserting a plastic tube into the uterus, and using suction to remove the embryo or fetus. Another relevant abortion method that is

performed during the first trimester is a "medical abortion," where the physician administers a medicine that both causes the death of the fetus and induces the uterus to contract and expel its contents.

During the second trimester, the increased size of the fetus requires more complex methods for its removal. *See Stenberg*, 530 U.S. at 925. The most common of these methods is called "dilation and evacuation," or "D&E." *Id.* D&E typically involves dilation of the cervix, followed by the extraction of part of the fetus through the cervix. The resistance caused by pulling the extracted portion of the fetus against the cervix causes the fetus to disjoin and die, after which the remaining parts are extracted. *Id.* A variation on "D&E" is known as "dilation and extraction," or "D&X," or alternatively "intact D&E."[1] The D&X procedure involves evacuating or otherwise compacting the fetus's skull while the head is still in the uterus so that the head will pass easily through the cervix. Where the fetus presents itself head first,

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[1] In its recent decision which addresses the constitutionality of the Federal Partial-Birth Abortion Ban Act of 2003, the Supreme Court primarily refers to this process as intact D&E. *See Gonzales v. Carhart*, 127 S. Ct. 1610 (2007). The Court noted that "the medical community has not reached unanimity on the appropriate name for this D&E variation," and that the procedure "has been referred to as 'intact D&E,' 'dilation and extraction' (D&X), and 'intact D&X.'" *Id.* at 1621. It does not appear that the different names incorporate any meaningful difference in the methods used. We will use the term D&X in this opinion, as it is the term utilized primarily by the parties, and, most significantly, is the nomenclature included in the Michigan Attorney General's Opinion. For purposes of this opinion, the term D&X is intended to be synonymous with the term "intact D&E" used by the Supreme Court in *Gonzales*.

the head is emptied and compressed first, after which the entire fetus is removed intact. If the fetus presents itself feet first, in the breech position, it is partially delivered to the point where the physician can access the fetus's head so as to puncture it and remove the contents. *See Taft*, 353 F.3d at 439-40. In some circumstances, D&X is considered by certain medical experts to be safer for the pregnant woman than D&E because it "involves less risk of uterine perforation or cervical laceration because it requires the physician to make fewer passes into the uterus with sharp instruments and reduces the presence of sharp fetal bone fragments that can injure the uterus and cervix," reduces the risk of retained fetal tissue or "free floating fetal head," and takes less time and involves less blood loss, trauma, and exposure to anesthesia. *Stenberg*, 530 U.S. at 953.

Another common second trimester procedure is induction, which appears to operate like a medical abortion occurring later in pregnancy, where a medication causes the uterus to contract and expel the fetus. Induction carries with it "all the potential complications of labor and delivery at term, and therefore, involves more pain, time and expense than D&E," as well as exposing some women to more risks of infection or other complications.[2] Joint App'x at 68, 83 (Hertz Decl.,

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[2] Classifying these various procedures involves a bit of oversimplification. As the plaintiffs' Declarant Dr. Michael Hertz indicates, physicians can never predict exactly how an abortion will proceed, and sometimes the methods must be modified during the procedure. Joint App'x at 68 (Hertz Decl.). For example, in some medical abortions and some inductions, the fetus will not pass from the uterus as smoothly as hoped, and it will become necessary to use some variation of D&E or D&X to complete the abortion. *Id.* at 66; Joint App'x at 82 (Berry Decl). Our outline focuses on the most common procedures and how they are most often used, as

Berry Decl.). The remaining methods of second trimester abortion are hysterectomy, or removal of the uterus (which leaves the woman sterile), and hysterotomy, which is akin to a premature caesarian section. Joint App'x at 83. Both of these methods are obviously much more invasive and dangerous for the woman than D&E, D&X, or induction. *Id.*

The classifications of these particular abortion procedures are important because the Supreme Court and this Court have used them as a reference for which abortion procedures a state can permissibly prohibit under *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992). *See Gonzales*, 127 S. Ct. at 1620-23; *Stenberg*, 530 U.S. at 920; *Taft*, 353 F.3d at 439-40. *Casey* held that a state may regulate abortion before viability so long as it does not impose an "undue burden" on a woman's right to terminate her pregnancy, and may regulate and even prohibit abortion after viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Casey*, 505 U.S. at 879 (citing *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

Stenberg applied this standard to a Nebraska law regarding procedures that critics labeled "partial-birth abortion." 530 U.S. at 921. The Court held that the undue burden standard simply barred a state from prohibiting "the more commonly used D&E procedure," as doing so would place "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 938 (quoting *Casey*, 505 U.S. at 877). This portion of *Stenberg*'s holding is relatively straightforward: if a statute prohibits pre-viability

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well as the classifications that the Supreme Court applied to them in *Stenberg* and *Gonzales*.

D&E procedures, it is unconstitutional. *See id.*; *see also Taft*, 353 F.3d at 438. The other aspect of *Stenberg*'s holding allowed a general statutory ban on less common abortion procedures (including D&X), presumably as part of a state's ability to regulate previability abortion methods, but with a caveat: "where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, *Casey* requires the statute to include a health exception when the procedure is 'necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.* (quoting *Casey*, 505 U.S. at 879). The *Stenberg* Court ruled that such an exception to Nebraska's ban on D&X was necessary, in light of the district court's "highly plausible record-based explanation" of why D&X "obviates health risks in certain circumstances," in light of "a division of opinion among some medical experts," and in the absence of controlled medical studies on the issue. *Stenberg*'s two-part holding, in sum, was that it is an undue burden for a state to prohibit "the more commonly used D&E procedure," and that "a statute that altogether forbids D&X creates a significant health risk," and is therefore impermissible. *Stenberg*, 530 U.S. at 938.

At the time of the district court's opinion, and during briefing and argument in this case, this precedential framework governed the limitations that Michigan could constitutionally place on abortion procedures. Since that time, however, the Supreme Court issued its decision in *Gonzales v. Carhart*, 127 S. Ct. 1610, in which it upheld as constitutional the federal Partial-Birth Abortion Ban Act of 2003, codified at 18 U.S.C. § 1531. The first relevant portion of *Stenberg*'s undue burden analysis – that a statute regulating abortion procedures cannot prohibit the D&E procedure without imposing an unconstitutional undue burden – was left undisturbed in *Gonzales*. *Id.* at 1629-31. In upholding the

federal statute, however, *Gonzales* expanded on *Stenberg* in two ways. First, the Court distinguished *Stenberg* based on critical differences between the language of the Nebraska and federal statutes. Specifically, in *Stenberg*, the Nebraska statute was deemed to prohibit D&E procedures because it prohibited delivering "a substantial portion" of the fetus "for the purpose of performing a procedure" that will kill the fetus. 530 U.S. at 938-39. Because D&E often involved pulling an arm or a leg of a still living fetus past the cervix, this language would include the D&E procedure within its prohibition. *Id.* On the other hand, the federal statute provides what the Court referred to as "anatomical landmarks," which require as a prerequisite to the statutory prohibition that the fetal head or, in the case of a breech presentation, the fetal trunk past the navel must be outside the body of the woman prior to the act that causes the death of the fetus. *Gonzales*, 127 S. Ct. at 1627. Based on these "landmarks," the Court held that the federal statute could not be said to prohibit D&E, which "requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix." *Id.* The federal statute was therefore held constitutional. By distinguishing the federal statute from the Nebraska statute, *Gonzales* did not disrupt *Stenberg*'s holding that prohibition of D&E would amount to an unconstitutional undue burden.

Second, *Gonzales* complicated the meaning of *Stenberg*'s holding regarding the need for a health and life exception. The federal Act prohibiting D&X contains no health exception, *see* 18 U.S.C. § 1531, raising a possible violation of *Stenberg*. Yet Congress justified this omission from the Act by making its own factual findings in enacting the law. In these findings, it stated that "Congress is not bound to accept the same [district court] factual findings that the Supreme Court was bound to accept in Stenberg under the 'clearly erroneous' standard," and that "overwhelming evidence

presented and compiled at extensive congressional hearings . . . demonstrates that a [D&X] abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care." Congressional Findings, ¶¶ 5, 8, Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003). Despite these congressional findings, all three district courts that addressed the federal ban in the first instance found that D&X was necessary in some circumstances to preserve the woman's health, based on medical evidence that differed from the congressional findings. *Gonzales*, 127 S. Ct. at 1635-37.[3] Faced with these contradictory factual determinations, the Supreme Court endorsed neither in its entirety, stating that "[u]ncritical deference to Congress' factual findings in these cases is inappropriate," and, alternatively, that endorsing the findings of "part of the medical community" was "too exacting a standard to impose on the legislative power." *Id.* at 1638. In light of the factual conflict, the Court held that with respect to challenges based on the need for a health

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[3] The Supreme Court stated that the three district courts "appeared to be in some disagreement on this central factual question." *Id.* at 67. Based on its description of the three district court opinions, however, the disagreement only appears to have involved the extent to which each district court credited factual assertions that differed from those made by Congress. Specifically, two district courts found that D&X was the safest procedure to preserve the woman's health in certain circumstances. *Id.* The third "was more skeptical of the purported health benefits," but nevertheless concluded that a significant body of medical opinion . . . holds that [D&X] has some safety advantages (however hypothetical and unsubstantiated by scientific evidence) over D & E for some women in some circumstances." *Id.* at *68 (quoting *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004)).

exception, facial challenges were inappropriate, but as-applied challenges could be maintained. *Id.*

We now proceed to examine how this precedential framework applies to the Michigan abortion law at issue in this case.

III.

Because the district court in this case appears to have addressed the constitutionality of the Act without crafting any injunctive relief, the issue on appeal involves only a question of law that we review de novo. *In re Koenig Sporting Goods, Inc.*, 203 F.3d 986, 988 (6th Cir. 2000).

The state focuses its appeal on three issues. First, it contends that the district court's remedy was too broad, and that instead of finding the entire statute unconstitutional, the district court should have enjoined only the unconstitutional applications of the statute and otherwise upheld it, particularly in light of the Attorney General's opinion limiting the scope of the statute. Next, Michigan argues that the district court should have found the case to be moot in light of the Attorney General's opinion, as Plaintiffs could not fear prosecution for violations of any unconstitutional applications of the statute in light of the opinion. Finally, the state claims that the district court should have certified a question regarding the scope of the statute to the Michigan Supreme Court before rendering a decision on its constitutionality. STTOP also appeals the district court's denial of its motion to intervene, both as a matter of right and its request for permissive intervention.

A. Scope and Meaning of the Statute and the Attorney General's Opinion

The district court found that the Act imposed an undue burden by prohibiting the D&E procedure, and failed to contain an adequate exception to protect the woman's health and life. In challenging both of these determinations, the state contends that the district court did not give adequate deference to the Attorney General's Opinion.

1. Undue Burden Related to D&E

Michigan does not challenge the plaintiffs' claim that it cannot prohibit the use of the D&E abortion method under *Stenberg* and *Taft*. Instead, it argues that "[a]s demonstrated by the Attorney General's Opinion, the Act must be construed to apply to only the dilation and extraction (D&X) procedure with a life and health exception consistent with *Taft* in order to give effect to the statute's legislative intent." Appellant's Br. at 11. The state neither concedes that on its face, the statute goes too far by prohibiting pre-viability abortion procedures beyond D&X, nor explicitly argues that the statutory language is constitutional as written. Instead it insists that "[a] fair reading of the Michigan statute makes it clear that the [Act] contemplates prohibiting the D&X procedure alone." Appellant's Br. at 23. The gist of this argument would seem to be that the legislature intended to only prohibit D&X, even if it did so somewhat inartfully, and that the statutory language, while inexact, is subject to the narrowing construction expressed in the Attorney General's opinion. The state further argues that the district court failed to adequately consider the applicable rules of statutory construction and the Act's legislative history, and failed to adequately defer to the Michigan Attorney General's view of the law in ruling that it

reached beyond the D&X procedure and was therefore unconstitutional.

Michigan largely relies on the Supreme Court's decision in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), in which the Court addressed a New Hampshire law that prohibited a physician from performing an abortion on a minor until 48 hours after written notice of the pending abortion was sent to the minor's parents. Although the statute in *Ayotte* provided exceptions for instances when the woman's health was at risk, the lower federal courts had determined that the provision was insufficient to adequately address such health concerns, and that the parental notification law should be enjoined entirely. *Id.* at 325-26. The Supreme Court addressed only the remedy, determining that it was too broad and that only the unconstitutional portions of the statute should have been enjoined. *Id.* at 326.

The *Ayotte* court addressed "three interrelated principles [that] inform our approach to remedies." *Id.* at 329. First, the Court seeks to avoid "nullify[ing] more of a legislature's work than is necessary," because doing so "frustrates the intent of the elected representatives of the people." *Id.* For this reason where partial, rather than facial, invalidation is possible, it is the "required course." *Id.* Second, the Court noted that "mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it." *Id.* This consideration counsels in favor of looking to how clearly the court has "already articulated the background constitutional rules at issue and how easily we can articulate the remedy." *Id.* Thus where the Court has established a bright line constitutional rule, it is more appropriate to invalidate parts

of the statute that go beyond the constitutional line, whereas "making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a 'far more serious invasion of the legislative domain' than we ought to undertake." *Id.* at 330 (quoting *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995)). Finally, the Court considers legislative intent, and inquires whether the legislature would prefer to have part of the statute remain in force. *Id.* At the same time, however, the Court is "wary of legislatures who would rely on our intervention," because where states merely cast as wide a net as possible and leave it to the courts to determine the permissible extent of a statute's reach, they run the risk of delegating legislative authority to the judiciary. *Id.* In light of these three considerations, the *Ayotte* Court remanded the case, ordering that "[e]ither an injunction prohibiting unconstitutional applications or a holding that consistency with legislative intent requires invalidating the statute *in toto*" was the proper result. *Id.* at 331.

At first blush, there could appear to be some degree of tension between the Supreme Court's command in *Ayotte* that lower federal courts consider partial invalidation of a law's unconstitutional portions before enjoining it in its entirety, and its prior decision in *Stenberg*, in which it upheld the complete invalidation of Nebraska's statute relating to D&E procedures. The Nebraska statute addressed in *Stenberg* generally prohibited what it termed "partial-birth abortion" (with certain health-related exceptions), which it defined as "an abortion procedure in which the person performing the abortion partially delivers vaginally a living unborn child before killing the unborn child and completing the delivery." 530 U.S. at 922. The statutory definition of "partial delivery" included delivery "into the vagina a living unborn child, or a substantial portion thereof." *Id.* Much like the Michigan

Attorney General argues here, the Nebraska Attorney General sought to have the Court uphold the statute based on his narrowing construction, contending that the statutory language of the Nebraska statute differentiated between D&E and D&X. The Court determined that it had to "reject his interpretation, for it conflicts with the statutory language," reasoning that "we are 'without the power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.'" 530 U.S. at 942, 944 (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)). As the Court noted, "D&E will often involve a physician pulling a 'substantial portion' of a still living fetus, say an arm or leg, into the vagina prior to the death of the fetus." *Id.* at 939. Thus, the Attorney General's claim that the statute only applied to D&X procedures was simply at odds with the plain language of the statute.

A closer reading of *Ayotte* and *Stenberg* reveals that their remedial approaches are not inconsistent with each other, despite differences between the remedy eventually imposed in each case. First, a substantive distinction between the statutes addressed in the two cases rendered partial invalidation a more natural approach in *Ayotte* than in *Stenberg*. The *Ayotte* Court concluded that in general, New Hampshire's parental notification requirement was constitutional. 546 U.S. at 326. Under the Court's precedent, however, it was undisputed that the law had to have an exception that would allow abortions without consent from a parent or a judge where they were necessary to protect the life and health of the woman, and the Court found New Hampshire's health exception insufficient. *Id.* at 327-28. Because the unconstitutional portion of the statute (the emergency health exception) was a provision that could be addressed separately from the underlying rule (the parental consent requirement), it was a strong candidate for partial invalidation. In contrast, the underlying rule in

Stenberg simply functioned to prohibit D&E procedures. In order to modify this rule to undo the undue burden, a full-blown rewriting of state law would have been required, a course that *Ayotte* itself cautions against.

The *Ayotte* Court also distinguished *Stenberg*'s remedy by noting that "the parties in *Stenberg* did not ask for, and we did not contemplate, relief more finely drawn." *Id.* at 331. Interestingly, however, although the parties in *Stenberg* did not seek severance or partial invalidation, the Nebraska Attorney General did seek to have the Court adopt his narrowing interpretation. The Court expressly declined this request, noting that "we are aware that adopting the Attorney General's interpretation might avoid the constitutional problem discussed in this section. But we are 'without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.'" 530 U.S. at 944 (quoting *Boos*, 485 U.S. at 330). These statements in the two cases indicate that there is a meaningful distinction between partially invalidating or severing a statute (the course preferred under *Ayotte*), and adopting a narrowing construction (the course rejected in *Stenberg* and requested here by the Michigan Attorney General). It may well be that a strained narrowing construction has more potential to amount to judicial rewriting of the statute than does partial invalidation, even though the two appear to be closely related. Although Michigan conflates the two doctrines, we nevertheless agree that if either of these more limited remedies is available, they would be the preferred course.

The bottom line is that the limited remedy under either constitutional avoidance or partial invalidation must be consistent with the text of the statute, lest the courts usurp the legislative function. *See Ayotte*, 546 U.S. at 330 ("[I]t would certainly be dangerous if the legislature could set a net large

enough to catch all the possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied." (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)). This point was recently reinforced in *Gonzales*, where the Court deemed applicable the doctrine of constitutional avoidance without disturbing the doctrine's inapplicability with respect to the Nebraska statute addressed in *Stenberg*. 127 S. Ct. at 1631. The Court specifically "put . . . to rest" what it described as the "antagonistic 'cannon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs.'" *Id.* (quoting *Stenberg*, 530 U.S. at 977 (Kennedy, J. dissenting)). Even so, it affirmed *Stenberg*'s "uncontroversial proposition that the canon of constitutional avoidance does not apply if a statute is not 'genuinely susceptible to two constructions.'" *Id.* (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998)).

With this background and the preference for a limited remedy in mind, it is apparent that *Stenberg* largely governs our analysis here, given the striking similarities it shares with this case. Much like the Nebraska statute, the Michigan statute applies as soon as a portion of the fetus passes beyond the vaginal introitus.[4] As the Supreme Court in *Stenberg* and

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[4] There is a slight distinction in that the Nebraska statute applied where a portion of the fetus passed beyond the cervix into the vagina, as opposed to the vaginal introitus. The evidence before the district court indicated that this is not a meaningful distinction, and Michigan does not argue to the contrary. In his declaration, Dr. Michael Hertz explained that in a D&E procedure "[i]t is not unusual that I will pull a fetal part past the vaginal introitus before it is disarticulated from the rest of the fetus. This is particularly so because during a D&E, I use a tenaculum to pull the cervix towards the vaginal introitus, which shortens, if not eliminates, the distance

the district court here both recognized, this necessarily means it applies to D&E procedures. Further, Plaintiffs submitted unrebutted evidence from their declarants that the statute could also apply to the protected suction curretage procedure. Because suction curretage is used more often than D&E, and used earlier in the pregnancy at a time more removed from viability, the potential for a statutory prohibition of some suction curretage procedures would impose even more of an undue burden on a woman's right to terminate her pregnancy than a prohibition of D&E. In fact, the one procedure the statute would appear not to apply to is a D&X procedure where the fetus presents itself headfirst, as that is the one instance where its death is brought about (through evacuation of the skull) before any portion of it passes beyond the cervix or vaginal introitus. Thus, just as in *Stenberg*, the Michigan Attorney General's interpretation of the statute to only apply to D&X procedures and not D&E procedures is entirely at odds with the language of the statute. The statute is "not genuinely susceptible to two constructions," and therefore the canon of constitutional avoidance does little to save it. *See Gonzales*, 127 S. Ct. at 1631. Were we to place our judicial imprimatur on the Attorney General's opinion, we would impermissibly usurp the function of the Michigan legislature.

The reasoning set forth in the Michigan Attorney General's opinion actually reinforces our determination that its narrowing construction is at odds with the language of the statute. The opinion states that "the D&E procedure requires dismemberment or disarticulation of the fetus and removal of

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between the cervix and vaginal introitus, . . . [which is] crucial – both in D&E and suction curettage procedures – to avoid injury due to instrumentation in the uterus." Joint App'x at 67 (Hertz Decl. at 5).

the dead fetus 'piece-by-piece' from the woman's uterus – there is no intact extraction of the fetus," and concludes that as a result "the fetus would never achieve the status of a perinate under the statute." A.G. Op. at 9. This conclusion is based on either a misunderstanding or an inaccurate description of the D&E procedure. *Stenberg* and *Taft* – and the evidence before the district court in this case – make clear that D&E involves and even requires removing a portion of the fetus from the uterus before dismemberment. *See Stenberg*, 530 U.S. at 939; Joint App'x at 67 (Hertz Decl.). Under this procedure, the fetus would therefore become a perinate, as part of it will pass the vaginal introitus, and its subsequent demise would subject the physician to criminal liability based on the Michigan statute. As the Court stated in *Stenberg*, "[t]he relevant question is *not* whether the legislature wanted to ban D&X; it is whether the law was intended to apply *only* to D&X. The plain language covers both procedures." 530 U.S. at 939 (emphasis in original). The same reasoning applies here.

The Supreme Court's holding in *Gonzales* is also of little avail to Michigan on this point. *Gonzales* left undisturbed the holding from *Stenberg* that a prohibition on D&E amounts to an undue burden on a woman's right to terminate her pregnancy. 127 S. Ct. at 1626-27. Although the Court upheld the federal ban, it explicitly distinguished it from the Nebraska ban addressed in *Stenberg*. Most significantly for present purposes, the "anatomical landmarks" in the federal ban ensured that it did not prohibit standard D&E. The Nebraska statute's reference to a "substantial portion" of the fetus did not lend itself to a similar limitation. When compared to these other two statutes, the Michigan statute, which applies when "any anatomical part" of the fetus passes the vaginal introitus, is easily the most sweeping and the most burdensome of the three. That is, whatever "substantial part"

means, it must require the removal of more than "any anatomical part," and both clearly fall short of the "anatomical landmarks" of the federal ban. Because an anatomical part must be removed to conduct a D&E abortion, it is apparent that the Michigan statute would prohibit D&E, and under the framework of *Stenberg* and *Gonzales*, impose an unconstitutional undue burden.

Additionally, as the plaintiffs point out and the district court found, the statute's plain language would also apply to some suction curretage abortions, medical abortions and induction abortions, because the signs of life identified in the statute, such as a heartbeat, are often present after the fetus or embryo passes beyond the vaginal introitus in such procedures. 394 F. Supp. 2d at 985-86. This fact further supports the conclusion that the statute is unconstitutional, particularly because it would prohibit several of the most common pre-viability abortion methods. As *Stenberg* instructs us, this effect creates an unconstitutional undue burden in violation of *Casey*. The Act's failure to distinguish between pre- and post-viability abortions only exacerbates this problem. *See Stenberg*, 530 U.S. at 930 ("The fact that Nebraska's law applies both pre- and post-viability aggravates the constitutional problem presented.").

Our decision is also well supported by the Supreme Court's warning to be wary of statutes that set an extremely wide net of prohibited conduct, and leave it to the courts to set the constitutional boundaries. The rationale behind this rule is that such an approach would involve "substitut[ing] the judicial for the legislative department of the government." *Ayotte*, 546 U.S. at 330. This warning is apropos here – the Michigan legislature appears to have cast a wide net that would prohibit virtually all methods of abortions once a fetal heart beat is detectable, including the constitutionally

protected D&E procedure, despite knowing that some of these procedures were constitutionally protected, and perhaps with the intention of prohibiting everything the federal courts will allow. A court order prohibiting the statute from applying beyond the D&X procedure would involve the Court too deeply in the legislative process, as warned against in *Ayotte*. The language the legislature settled upon would in fact allow some D&X procedures while prohibiting most constitutionally protected procedures – an approach that undermines our ability to narrow or partially invalidate the statute to render it constitutional under both *Stenberg* and *Ayotte*. Ultimately, because any limitation would be entirely at odds with the language of the statute, such an approach would contravene the holding of *Stenberg*.

In support of its position, Michigan also points to this Court's decision in *Taft*, which upheld an Ohio statute prohibiting partial birth abortion. A reading of the statute at issue in *Taft* presents a clear distinction from the Michigan statute. The statute in *Taft* explicitly stated that "[t]his section does not prohibit the suction curretage procedure of abortion, the suction aspiration procedure of abortion, or the *dilation and evacuation procedure of abortion*." 353 F.3d at 452 (citing Ohio Rev. Code Ann. § 2919.15.1(f)) (emphasis in *Taft*). Although the statute did not itself define "dilation and evacuation," this Court was not troubled by the omission, as it concluded that the meaning of the term was commonly known. *See id.* at 452-53. The Michigan statute contains no similar exception or clear definitions that would avoid sweeping up protected abortion procedures within its prohibition, and thus *Taft* is of no help to the state here.

The state also points to the legislative history of the Act to support its claim that it was intended to prohibit only D&X, and not D&E. This argument is flawed at the outset,

however, given the unambiguous language of the statute, which applies any time a portion of the fetus passes the vaginal introitus, rendering it unnecessary to rely upon the legislative history here. *See Sherwin-Williams Co. v. United States*, 403 F.3d 793, 797 (6th Cir. 2005) ("Because the relevant Code provisions are unambiguous, . . . there is no need to consult legislative history."). Additionally, the substance of the legislative history is actually more ambiguous than the statutory language. In the statements cited by Michigan, most of the state legislators refer to "partial-birth abortion" without distinguishing between D&X and D&E. See Appellant's Br. at 25-26. In fact, the term could be read to apply to either method, as D&E involves the partial delivery of a portion of the fetus which the physician subsequently pulls on to bring about dismemberment.[5] Although some of the legislators' comments reference the collapse of the fetus's head, which is used in D&X, others use language that refers to both procedures. *Id.* at 25 (characterizing the bill as "granting protection as soon as a single part of the baby's anatomy clears the vaginal opening"). The legislative history is of no help to the state, primarily because the text of the

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[5] In *Gonzales*, the Court read the term "partial-birth abortion" to refer only to D&X, but this interpretation was based on the definition provided in the federal statute. 127 S. Ct. at 1624. In contrast, the Nebraska statute addressed in *Stenberg* provided the more sweeping definition of "partial-birth abortion" that included D&E, leading to a broader interpretation of it in that case. *See* 530 U.S. at 922. The term apparently has no established medical definition. *See Gonzales*, 127 S. Ct. at 1641 n.1 (Ginsburg, J., dissenting) ("The term 'partial-birth abortion' is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions."). Without some contextual backdrop, comments by legislators that only reference "partial-birth abortion" cannot be more narrowly read to apply only to D&X.

statute is unambiguous, but also because the legislative history only creates potential ambiguity. The Supreme Court rejected the legislative history as a source of guidance in *Stenberg* for similar reasons. 530 U.S. at 943.

The state finally contends that the Attorney General's Opinion should have been granted a greater degree of deference by the district court as a persuasive authority for interpreting Michigan law. This argument is similarly belied by *Stenberg*. The Court noted that "[t]his Court's case law makes clear that we are not to give the Attorney General's interpretative views controlling weight," adding that "our precedent warns against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement agencies.'" 530 U.S. at 940. The parties agree that the Michigan Attorney General cannot bind the state's courts. Although the Attorney General argues that he can bind local prosecutors, this would not appear to be sufficient under *Stenberg*, particularly because, as the plaintiffs point out, an Attorney General's Opinion has no precedential value, and can be revised any time by this or successive Attorneys General. Moreover, as the *Stenberg* Court noted, "even were we to grant the Attorney General's views 'substantial weight,' we still have to reject his interpretation, for it conflicts with the statutory language." 530 U.S. at 942. For the reasons already discussed, the Michigan Attorney General's Opinion also conflicts irreconcilably with the statutory language. Therefore, the district court correctly rejected deferring to the Attorney General's opinion here.

Although federal courts are required to seek to uphold the constitutionality of state statutes where possible so as to refrain from interfering with the democratic functioning of a state's representative government, in this case Michigan

passed a statute that clearly went beyond the limitations established by the Supreme Court in *Stenberg* on a nearly identical issue. Further, the statute was passed after this Court's decision in *Taft*, which upheld a significantly narrower Ohio statute in a decision that outlined at length the limitations on a state's ability to regulate abortion procedures under *Stenberg*. *See* 353 F.3d at 443-53. Michigan therefore had significant guidance in implementing a statute that would ban only the D&X procedure – the goal that the state now contends it was attempting to achieve – but instead passed a very broadly-worded statute that showed no meaningful attempt to comply with the constitutional limitations articulated by federal courts in the area of abortion law. We are not in a position to rectify this dragnet approach to legislation, and must affirm the district court's invalidation of the statute based on the undue burden imposed by its general prohibition of many constitutionally protected abortion procedures.

The district court's decision that Michigan's broad abortion statute created an unconstitutional undue burden on a woman's right to terminate her pregnancy because it prohibits D&E was in full accordance with the Supreme Court's guidance in both *Stenberg* and *Ayotte*, and has in no way been undermined by the interim decision in *Gonzales*. It is therefore affirmed.

2. Life and Health Exception

The life and health exceptions in the Michigan statute provide as follows:

> (2) A physician or an individual performing an act, task, or function under the delegatory authority of a physician is immune from criminal, civil, or

> administrative liability for performing any procedure that results in injury or death of a perinate while completing the delivery of the perinate under any of the following circumstances:
>
> (a) If the perinate is being expelled from the mother's body as a result of a spontaneous abortion.
>
> (b) If in that physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary in either of the following circumstances:
>
> (i) To save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate.
>
> (ii) To avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed.

Mich. Comp. Laws § 333.1083. The district court found the health exception in part (2)(b)(ii) of the statute inadequate because in every abortion, the physician knows the outcome of the procedure to be the demise of the perinate. 394 F. Supp. 2d at 987. Thus, the district court concluded that the exception is essentially inoperative on its own terms, as it would prohibit every D&E and D&X procedure used to protect the health of the woman, in contravention of the holding in *Stenberg*. Similarly, with regard to the life exception in part (2)(b)(i), the provision that every reasonable effort must be made to save the life of the perinate requires the physician to balance the life of the woman with that of the perinate. The Supreme Court has found life exceptions to be

inadequate where they "require the mother to bear an increased medical risk in order to save her viable fetus." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 769 (1986). Because the life exception here does just that, the district court also found it to be unconstitutional. 394 F. Supp. 2d at 987-88.

As discussed above in Part II of this opinion, the Supreme Court's holding in *Stenberg* pertaining to the need for a health exception to otherwise valid D&X prohibitions was modified somewhat in *Gonzales*. It is not immediately apparent how this decision should affect Michigan's statute. On the one hand, *Gonzales*'s holding that an exception allowing D&X might not always be medically necessary was premised on a conflicted factual record, and doubts about the medical need for such an exception would appear to apply with equal force in this case. On the other hand, the factual findings that cast doubt on the safety implications of D&X were not part of the record in this case, were not a basis for the passage of the Michigan statute, and were made by the legislative body of an entirely separate sovereign, suggesting the possibility that they could be of diminished relevance here.

The most straightforward implication of *Gonzales* in this context might be its statement that facial challenges are not the preferred mechanism for challenges pertaining to health exceptions to prohibitions on the D&X procedure, suggesting that such a challenge should not be entertained here. Even so, it is not apparent how and whether *Gonzales* diminishes the rule requiring an exception to protect the woman's life that does not impose upon her an increased medical risk. *See Thornburgh*, 476 U.S. at 769 (prohibiting a "'trade-off' between the woman's health and additional percentage points of fetal survival.'" (citing *Colautti v. Franklin*, 439 U.S. 379, 397-401 (1979)). The federal statute contains an apparently

adequate life exception that allows D&X where necessary to save the life of the woman, which went unchallenged in *Gonzales*. *See* 18 U.S.C. § 1531(a) ("This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother . . ."). This suggests that the Supreme Court's precedent pertaining to the life exception remains unchanged.

For purposes of resolving the instant case, we can affirm the district court's decision without addressing the complicated implications of *Gonzales* for the life and health exceptions of the Michigan statute. The bottom line is that the life and health exceptions are *exceptions* to an unconstitutional and un-fixable general prohibition on certain abortion procedures. That is to say it is unnecessary for us to address exceptions to an unconstitutional and unenforceable general rule. Because we find the general prohibition to be unconstitutional, and we are unable and unsuited to rewriting a prohibition on the D&X procedure alone, there is little to gain by an attempt to resolve this issue.

3. Void for Vagueness

The district court further concluded that the Act was void for vagueness due to its confusing and ambiguous nature. The district court specifically noted that the Act "does not specify what medical procedures are banned and does not set forth specific penalties for violation of its terms." 394 F. Supp. 2d at 989. It also found that "the term 'perinate' is not a commonly used definition within the medical community," and further based its vagueness determination on the failure to define the terms "imminent threat" and "every reasonable effort." *Id*.

A statute is void for vagueness where it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions." *Colautti v. Franklin*, 439 U.S. 379, 390 (1979). Due process provides heightened protection against vague statutes "where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Id.*

We believe that the void for vagueness challenge presents a closer question than the undue burden challenges under *Stenberg* discussed above. It would in some ways seem that Plaintiffs' argument that the statutory language is clearly unconstitutional and that the Attorney General's Opinion cannot be read as a reasonable interpretation cuts against their void for vagueness argument. It does appear that some of the terms in the health and life exceptions are poorly defined, and would fail to notify physicians of exactly when these exceptions would apply, although these shortcomings do not bear upon the separate question of whether the general, prohibited conduct is vague, aside from the exceptions. At any rate, in light of our decision to affirm the district court's decision under *Stenberg*, we decline to reach the separate void for vagueness claim.

B. Mootness

Michigan argues that the plaintiffs' claims became moot after the issuance of the Attorney General's opinion, which interpreted the statute as not applying to constitutionally protected abortion procedures. The state contends that based on the opinion, the plaintiffs no longer have a fear of prosecution for performing constitutionally protected abortions.

We reject the state's mootness argument for several reasons. First, the opinion does not even provide an accurate description of the constitutionally protected D&E procedure, and thus cannot be said to allay fears of prosecution for performing constitutionally protected abortions. The opinion describes D&E as requiring dismemberment within the fetus prior to removal of any of the parts, which would prevent the fetus from ever becoming a perinate. A.G. Op. at 9. This reading is entirely at odds with the evidence before the district court as well as the description of D&E given in *Stenberg*. Significantly, the *Stenberg* Court based its holding in part on the evidence that "D&E will often involve a physician pulling a 'substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." 530 U.S. at 939. Additionally, Hertz explained in his declaration here that "[i]t is not unusual that I will pull a fetal part past the vaginal introitus before it is disarticulated from the rest of the fetus," due to the narrowing of the distance between the cervix and the vaginal introitus that occurs during the procedure. Joint App'x at 67 (Hertz Decl. at 5). This process clearly involves the fetus becoming a perinate, and the physician would be subject to prosecution for conducting the subsequent abortion. Because even the Attorney General's opinion incorrectly describes the D&E procedure, it would not allay any fear of prosecution that a physician might have when he performs a constitutionally protected D&E abortion where part of the perinate passes the vaginal introitus, because that procedure would not be covered by the opinion. This ambiguity renders the opinion itself vague (wholly independent from the question of whether the statute is vague), as it "conditions potential criminal liability on confusing and ambiguous criteria." *Colautti*, 439 U.S. at 394. As a result, it "presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." *Id.*

Further, as the plaintiffs point out, the opinion cannot alleviate fear of prosecution because it is not precedential, and the current Attorney General could change it whenever he sees fit, as could any future Attorneys General. The state has also conceded that the Attorney General's opinion is not binding on Michigan courts. Further, the extent to which it binds local prosecutors is at most unclear. On the one hand, the Michigan Supreme Court has stated that "the opinion of the Attorney General that a statute is unconstitutional does not have the force of law and certainly does not compel agreement by a governmental agency." *School Dist. v. Kent County Tax Allocation Bd.*, 330 N.W.2d 7, 12 (Mich. 1982). On the other hand, a Michigan statute provides that "[t]he Attorney General shall supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices." Mich. Comp. Laws § 14.30. Even if we were to assume that the Attorney General can prevent local prosecutors from enforcing the statute, this is somewhat beside the point, because given the non-binding nature of the opinion on the office of the Attorney General itself, it is insufficient to prevent Plaintiffs from having a fear of future prosecution.[6]

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[6] The state also argues that were any physicians to be prosecuted for performing abortions despite the Attorney General's Opinion, they could claim a defense of entrapment by estoppel, which provides an affirmative defense where a government official has assured a defendant that certain conduct is legal before the defendant engages in the conduct. As the plaintiffs point out, because entrapment by estoppel is an affirmative defense, it would not prevent them from being prosecuted, but at best would present a barrier to a conviction. This is cold comfort, and the prospect of being prosecuted and forced to litigate an affirmative defense could well impose a significant chilling effect on its own. Moreover, because the Attorney General's Opinion does not accurately define the

Even though "cessation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties," a party still bears a heavy burden to show that a case is mooted. *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003);[7] *see also Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) ("The 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."). In this case, that burden is increased by the fact that the voluntary

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constitutionally protected D&E procedure, it would not prevent a conviction in a case where a physician performed a D&E that was protected under *Stenberg* but did not fall within the definition offered by the Attorney General. Such a conviction would violate *Stenberg*, and thus the defense of entrapment by estoppel does little to advance the state's mootness argument.

[7] In *Ammex Inc. v. Cox,* we rejected a mootness claim based on a Michigan Attorney General's statement that he will not seek to prosecute legally protected activity, stating that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . If it did, the courts would be compelled to leave the defendant . . . free to return to his old ways." 351 F.3d at 704. In *Ammex*, the Attorney General had issued a Notice of Intended Action, indicating that he would seek to prevent alleged false advertising by a duty-free store regarding the application of state taxes. We reversed the district court's decision that the Attorney General's later withdrawal of the Notice made the case moot because "the Attorney General's withdrawal did not make it absolutely clear that the allegedly wrongful conduct could not be reasonably expected to recur." *Id.* at 704. This rationale applies here with equal force. It is not apparent to us how the Notice of Intended Action is different in any way under state law than an Attorney General's opinion, and the state has not argued that it is.

cessation only appears to have occurred in response to the present litigation, which shows a greater likelihood that it could be resumed. *See Ragsdale v. Turnock*, 841 F.2d 1358, 1366 (7th Cir. 1988) ("We share the district court's concern that the State's position on this provision is asserted only in this litigation."). Although the Attorney General has shown some willingness here to limit the scope of the Act, because he only did so once this lawsuit was filed, and even then did not correctly assess or define the constitutionally protected abortion methods, the state has not met the "heavy burden" of showing that it will not prosecute constitutionally protected abortions under the Act, and we therefore reject the state's mootness argument.

C. Certification to the Michigan Supreme Court

The state's claim that the question of the Act's meaning should be certified to the Michigan Supreme Court is simply contravened by express language in *Stenberg*, a nearly indistinguishable case. There, although the Nebraska Attorney General had not sought certification to the state supreme court in the lower federal courts, the Court stated that certification would still not have been appropriate, as "[c]ertification of a question (or abstention) is appropriate only where the statute is 'fairly susceptible' to a narrowing construction." 530 U.S. at 945.

A prerequisite to certification to a state supreme court is a determination that the statute in question is subject to a narrowing interpretation. *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (stating that before a federal court certifies a question to a state supreme court, it must "'first ascertain whether a construction . . . is fairly possible' that will contain the statute within constitutional bounds." (quoting *Ashwander v. TVA*, 297 U.S. 288, 348 (1936)

(Brandeis, J., concurring)). Because we agree with the district court that the language of the statute here is not subject to a limiting construction, this prerequisite for certification is not met. *See also Stenberg* 530 U.S. at 945 ("[W]e have never held that a federal litigant must wait a state-court construction or the development of an established practice before bringing the federal suit."). We therefore reject the state's argument that the district court should have certified the question to the Michigan Supreme Court before rendering its decision.

IV.

A. STTOP's Motion for Intervention as of Right

We turn now to STTOP's appeal of the denial of its motion for intervention. Rule 24 provides in pertinent part that

> [u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). A proposed intervenor must establish four elements to be entitled to intervene as of right: (1) that the motion to intervene was timely; (2) that the intervenor has a substantial legal interest in the subject matter of the case; (3) that its ability to protect that interest may be impaired in the absence of intervention; and (4) that the parties already before the court may not adequately represent its interest. *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999). The district

court found that STTOP did not have an adequate legal interest to intervene given its status as a mere supporter of a single piece of legislation, and that the Attorney General would fully protect its interests. This Court reviews de novo motions to intervene as of right, except for the timeliness element, which is reviewed for abuse of discretion. *Id.* Because the timeliness element is not in dispute here, we review the entire intervention of right issue de novo.

We note at the outset that the significance of STTOP's appeal of the denial of its motion for intervention is somewhat unclear in light of our decision to affirm the summary judgment entered by the district court on the merits. The finality of the summary judgment decision clearly has potential to render moot STTOP's motion to intervene. On the other hand, in light of STTOP's argument that it would have argued the case and developed the factual record differently than the state, a remand might be necessary to provide STTOP such an opportunity if the motion to intervene was incorrectly denied. In light of this possibility, we will address STTOP's appeal of the denial of its motion for intervention.

STTOP argues that as a public interest group involved in the process leading to the adoption of the challenged statute, it has a legal interest in the subject matter of the lawsuit. It cites to several cases from the Ninth Circuit applying such a rule. Plaintiffs distinguish the cases cited by STTOP by arguing that all of them involved long-standing groups with a broader interest than a single piece of legislation, as opposed to STTOP, which was created and continues to exist only for the purposes of advocating the passage and continued viability of the Act. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995) (allowing conservation group to intervene in suit related to protected status of snail species); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th

Cir. 1983) (allowing Audobon Society to intervene as of right in suit challenging a birds of prey conservation area); *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (allowing National Organization for Women to intervene in suit challenging ratification procedures for Equal Rights Amendment).

We have cited favorably to the Ninth Circuit cases relied on by STTOP in *Michigan State AFL-CIO v. Miller*, for the propositions that "a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation," and that "rules governing intervention are 'construed broadly in favor of the applicants.'" 103 F.3d 1240, 1245 (6th Cir. 1997). In *Miller*, we allowed the Michigan Chamber of Commerce to intervene as of right in a suit challenging amendments to the state's campaign finance law whose enactment the chamber had supported. We noted that the Chamber's legal interest was supported by four significant factors:

> (1) a vital participant in the political process that resulted in legislative adoption of the 1994 amendments in the first place, (2) a repeat player in Campaign Finance Act litigation, (3) a significant party which is adverse to the challenging union in the political process surrounding Michigan state government's regulation of practical campaign financing, and (4) an entity also regulated by at least three of the four statutory provisions challenged by plaintiffs.

Id. at 1247. In finding that the Chamber had a legal interest, we noted that "the intervention issue raised in this appeal is a close one." *Id.* Here, STTOP might share two of these four factors with the Chamber of Commerce, but clearly does not

share the other two. Although STTOP was involved in the process that resulted in the passage of the challenged legislation, and might be adverse to the plaintiffs in the state's regulation of abortion practices, it is not a repeat player in litigation, as it was created for only one specific ballot initiative, and is not itself regulated by any of the statutory provisions at issue here. This fourth factor is particularly significant - unlike the Chamber of Commerce in *Miller*, STTOP has only an ideological interest in the litigation, and the lawsuit does not involve the regulation of STTOP's conduct in any respect. Thus, STOPP's case for intervention here is much weaker than that of the Chamber of Commerce in *Miller*.

The plaintiffs rely largely on our opinion in *Providence Baptist Church v. Hillandale Comm., Ltd.*, which affirmed the denial of a motion to intervene as of right by a committee that existed to support a local referendum to amend a zoning ordinance. 425 F.3d 309, 316 (6th Cir. 2005). Because the committee's interest lay only in passing the referendum, the Court reasoned that "[a]ny substantial legal interest held by 'the duly authorized committee for a referendum which circulated the referendum petitions' was terminated when the referendum was held and the results certified." *Id.* at 317. Similarly, where STTOP was created and continues to exist for the purpose of passing and upholding the Act, its legal interest can be said to be limited to the passage of the Act rather than the state's subsequent implementation and enforcement of it.

The rationale behind denying intervention in *Providence Baptist* also points to a useful distinction from the Ninth Circuit cases cited in *Miller* and relied upon here by STTOP – those cases all involved challenges by a public interest group to the *procedure* required to pass a particular rule, as

opposed to the government's subsequent enforcement of the rule after its enactment. *See id.* ("In contrast to the cases cited by Hillandale Committee in its brief, this case raises no issue as to the validity of the election."); *see also Idaho Farm Bureau*, 58 F.3d at 1397 (involving an underlying suit challenging the process by which a rule was adopted by the Secretary of the Interior); *Sagebrush Rebellion*, 713 F.2d at 526 (same); *Freeman*, 625 F.2d at 886 (underlying suit involved state procedure for ratification of constitutional amendment). We find this distinction to be compelling, as the public at large – including public interest groups – has an interest in the procedure by which a given legal requirement is enacted as a matter of democratic legislative process. On the other hand, in a challenge to the constitutionality of an already-enacted statute, as opposed to the process by which it is enacted, the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant.

To be sure, public interest groups who are regulated by the new law, or, similarly, whose members are affected by the law, may likely have an ongoing legal interest in its enforcement after it is enacted. *See Grutter*, 188 F.3d at 401 (finding that proposed intervenors, who were applicants to University of Michigan, had a substantial legal interest in the school's admissions process). If the statute in this case regulated STTOP or its members, STTOP would likely have a legal interest, much like the intervenors in *Grutter* who were applicants to the University of Michigan. Alternatively, had STTOP sought to intervene in a suit challenging the legislative process by which the statute was enacted, its legal interest would be significantly stronger due to its involvement in the passage of the Act. After the Act's passage, however, STTOP's interest in the enforcement of the statute is greatly diminished due to the state's responsibilities in enforcing and

defending it as it is written. As things now stand, STTOP's interest in this case simply pertains to the enforceability of the statute in general, which we do not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right.

Without these sorts of limitations on the legal interest required for intervention, Rule 24 would be abused as a mechanism for the over-politicization of the judicial process. Because STTOP lacks a substantial legal interest in the outcome of the case, we affirm the district court's denial of its motion to intervene as of right, and need not address the other elements of intervention.

B. Permissive Intervention

Rule 24(b) provides that

> [u]pon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"The denial of permissive intervention should be reversed only for clear abuse of discretion by the trial judge." *Purnell v. Akron*, 925 F.2d 941, 951 (6th Cir. 1991). Here, the district court explained that it would not allow permissive intervention, reasoning that STTOP and Right to Life of Michigan were "openly hostile to Plaintiffs," and that based on their ideological goals, STTOP's "presence would seriously delay the adjudication and resolution of the matter since other issues would be raised by STTOP." 394 F. Supp.

2d at 990. This conclusion appears to be supported by the record, and is evinced by STTOP's brief here, which takes an ideological approach to the litigation rather than attempting to argue for the Act's validity under the relevant Supreme Court precedent. The district court also allowed STTOP to file an amicus brief along with two other separate entities. The district court appears to have addressed the relevant criteria required by Rule 24(b), and its denial of permissive intervention cannot be said to have been an abuse of discretion.

V.

We certainly are reluctant to interfere with a statute that represents the will of the elected representatives of the people of Michigan, and do not do so lightly. If, however, the Michigan legislature had sought in good faith to enact a statute that prohibited the abortion procedures it deemed objectionable while complying with the limits imposed by the Constitution, it had plenty of guidance on how to proceed. The Supreme Court's decision in *Stenberg* predates the Michigan statute by five years. Further, in *Taft*, we fully upheld an Ohio statute pertaining to such procedures the year before the Michigan statute was passed. Michigan could have simply copied that statute word-for-word, and been virtually guaranteed a favorable result in the courts of this Circuit. It instead opted to use statutory language that pushed almost every boundary that the Supreme Court has imposed for these types of laws, and which have recently been reaffirmed in *Gonzales*. Because the statute cannot be squared in any way with these limitations, and the Attorney General's opinion is similarly inconsistent with the relevant court decisions and with the statute itself, the district court correctly determined that invalidation is the only available course.

We therefore affirm the district court's entry of summary judgment in favor of Plaintiffs on the basis of its determination that the Act imposes an undue burden on a woman's right to terminate her pregnancy under *Stenberg*. We also affirm the district court's denial of STTOP's motions for intervention.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-CV-70779

[Filed September 12, 2005]

NORTHLAND FAMILY PLANNING CLINIC, INC., *et al.*, Plaintiffs,	)
v.	)
MICHAEL A. COX, Attorney General of the State of Michigan, *et al.*, Defendants.	)

JUDGES: Honorable Denise Page Hood, United States District Judge.

MEMORANDUM OPINION AND ORDER

I. BACKGROUND/FACTS

On March 1, 2005, Plaintiffs Northland Family Planning Clinic, Inc., Northland Family Planning Clinic, Inc.-West, Northland Family Planning Clinic, Inc.-East, Summit Medical Center, Inc., Planned Parenthood Mid-Michigan Alliance,

Planned Parenthood of South Central Michigan, Stanley M. Berry, M.D., Timothy R.B. Johnson, M.D., Karoline S. Puder, M.D., and Ronald C. Strickler, M.D., filed the instant class action against Defendants Michael A. Cox, Attorney General of the State of Michigan, and Kym L. Worthy, Prosecuting Attorney for Wayne County, in their official capacities. The Complaint seeks preliminary and permanent injunctive relief and declaratory judgment.

Plaintiffs allege four claims for relief. The first claim is that by prohibiting physicians from performing abortions before the viability of the fetus, the Act has the purpose and effect of imposing an undue burden on women's right to choose abortion in violation of their right to privacy and liberty guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1983. The second claim is that by prohibiting physicians from performing a range of medical procedures – including virtually all safe and common abortion methods, regardless of the stage of pregnancy–and by limiting the circumstances under which a physician may perform these procedures to preserve the woman's life and health, the Act violates the right to privacy, life, and liberty guaranteed by the Fourteenth Amendment and 42 U.S.C. § 1983. The third claim is that by failing to give adequate notice of the conduct proscribed, and encouraging arbitrary and discriminatory enforcement, the Act is impermissibly vague in violation of the Fourteenth Amendment and 42 U.S.C. § 1983. The fourth claim is that by endangering the health and lives of women, but not men, the Act violates the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

Michigan Public Act 135 of 2004, known as the Legal Birth Definition Act, codified as Michigan Compiled Laws (M.C.L.) §§ 333.1081-333.1085, was proposed by an initiative petition pursuant to Article 2, § 9 of the Michigan

Constitution (1963), and passed by the Michigan Legislature in June 2004. M.C.L. § 333.1081; Compiler's Note. The Act was scheduled to take effect on March 30, 2005. The parties entered into a Stipulation agreeing to a Temporary Restraining Order until the Court ruled on the Motion for Preliminary Injunction. (March 14, 2005, Stipulation and Order)

Plaintiffs claim that the Act, M.C.L. § 333.1083(1), defines a "perinate" as a "legally born person for all purposes under the law." (Complaint, ¶ 24) A "perinate" is defined in M.C.L. § 333.1085(d) as a "live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus [i.e., opening] until the point of complete expulsion or extraction from the mother's body." (Complaint, ¶ 25). "Live," in M.C.L. § 333.1085(c), is defined as demonstrating one or more of the following: "(i) a detectable heartbeat; (ii) evidence of breathing; (iii) evidence of spontaneous movement; (iv) umbilical cord pulsation." (Complaint, ¶ 26) The Act, under M.C.L. § 333.1085(a) defines an "anatomical part" as "any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta." (Complaint, ¶ 27) M.C.L. § 333.1084 provides that, "[n]othing in this act shall abrogate any existing right, privilege or protection under criminal or civil law that applies to an embryo or fetus." (Complaint, ¶ 28). Plaintiffs claim that the Act applies regardless of the stage of gestation of the pregnancy, regardless of fetal viability, and regardless of whether the embryo or fetus is intact. (Complaint, ¶ 29)

Plaintiffs further claim that under the Act, M.C.L. § 333.1083(2), a "perinate" is a person with independent legal rights under Michigan law and that any act or omission

by a physician that harms a "perinate" gives rise to the same "criminal, civil, or administrative liability" that would attach if the embryo or fetus were in fact a born person. (Complaint ¶ 30) The Act immunizes physicians from such liability under M.C.L. § 333.1083(2) in three circumstances. The first is where the perinate is being expelled form the mother's body as a result of a spontaneous abortion. The second and third circumstances are, if in the physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, a medical procedure was necessary to save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate, or, to avert an imminent threat to the physical health of the mother and any harm to the perinate was incidental to treating the mother and not a known or intended result of the procedure performed. (Complaint, ¶ 31) An imminent threat to physical health is defined in the Act, M.C.L. § 333.1085(b) as "a physical condition that if left untreated would result in substantial and irreversible impairment of a major bodily function." (Complaint, ¶ 32)

Plaintiffs allege that the Act subjects physicians using almost any common method of abortion to a host of severe penalties under Michigan law and it functions as a virtual ban on abortion. (Complaint, ¶ 33) During the first trimester, abortions are performed by "suction curettage" where the physician empties the uterus with suction. In the suction curettage procedure, the physician first dilates the cervix, which is the lower part of the uterus that opens into the vaginal canal, inserts a plastic tube into the uterus, then uses a suction to remove the embryo or fetus and other products of conception. During this procedure, Plaintiffs claim some part of the fetus that is still attached to the remainder of the fetus may pass "beyond the plane of the vaginal introitus," while

the embryo or fetus has one of the indicia of life enumerated in the Act. (Complaint, ¶ 37)

In the second trimester, the method used is "dilation and evacuation" or "D&E." The physician dilates the cervix and then uses a combination of suction and forceps to draw the fetus out of the uterus. Sometimes the physician withdraws the fetus from the uterus largely intact. At other times, the physician may bring a part of the fetus through the cervix attached to the rest of the fetus in the uterus, and the counter-resistance of the remainder of the fetus against the cervix causes the fetal part to disjoin. In each of these scenarios, part of the fetus with one of the enumerated indicia of life may be "beyond the plane of the vaginal introitus." The fetus may not be fully extracted when the physician performs the act which results in the death of the fetus. (Complaint, ¶ 38)

A physician may also perform an abortion using the induction method during the second trimester where the physician induces uterine contractions by administering one of several medicines vaginally, orally, rectally, or into a vein. Sometimes, during this procedure, a part of the fetus with one of the Act's enumerated indicia of life, may emerge "beyond the plane of the vaginal introitus," but the fetus is not completely expelled. The continued delivery of the fetus would result in its demise. When the fetus cannot be completely expelled, variations of the surgical steps described above must be used to complete the abortion, resulting in the demise of the fetus. (Complaint, ¶ 39)

The suction curettage, D&E and induction abortion methods are used to induce abortion and to treat or complete pregnancy loss. During a pregnancy loss, the embryo or fetus remains in the uterus, while having one of the Act's enumerated indicia of life, and a physician must employ one

of these methods to empty the uterus. (Complaint, ¶ 40) When performing any of the methods, a physician knows that by the end of the procedure the fetus will die. The physician does not focus on when the fetus dies but ensures the complete evacuation of the uterus as quickly and safely as possible for the woman. (Complaint, ¶ 42)

Plaintiffs claim that the Act would criminalize certain actions and omissions by a doctor when delivering a fetus at term. For example, if a physician knows the fetus has no chance of survival during the delivery of a fetus with fatal anomalies at term, the physician generally will not take actions to preserve the life of the fetus where such actions would endanger the woman. If the fetus dies at this state, the physician's act would be criminal under the Act. (Complaint, ¶ 43)

Plaintiffs claim that two abortion methods involving major abdominal surgery, a hysterectomy, which involves the removal of the uterus, and hysterotomy, involving making a surgical incision through the abdominal wall and into the uterus to deliver the fetus, are not criminalized under the Act. These two methods do not entail the passage beyond the plane of the vaginal introitus. Plaintiffs claim these abortion methods are generally unacceptable as abortion methods except in extremely rare circumstances and are far more dangerous to the woman. (Complaint, ¶ 41)

Plaintiffs assert that the portion of the Act which immunizes physicians from liability for performing a procedure which would harm a perinate, such as a spontaneous abortion or harm to the woman's life or health, are inadequate and are so limited in their applications which would endanger the lives and health of the pregnant women. The exception found in M.C.L. § 33.1083(2)(a)-(b) does not

immune from liability those assisting the physician nor the women procuring abortions. (Complaint, ¶ 4)

Plaintiffs argue the Act fails to give adequate notice to the physicians as to what procedures or actions will subject the physicians to liability. Plaintiffs claim the Act uses terminology which does not describe any particular medical procedure, which leaves physicians to guess as to what procedures or actions are encompassed by the Act. The term "imminent threat to the woman's physical health" is unclear because it could mean that the "threat" must be "imminent" in order for the Act's health exception to apply. Also, the term that a physician make "every reasonable effort" to preserve the life of the perinate when performing a life-saving abortion is impossible to do because it is impossible to preserve the life of an embryo or pre-viable fetus outside the uterus. (Complaint, ¶ 46)

Plaintiffs further argue that the Act's lack of clarity allows prosecutors to differ widely about what conduct they believe gives rise to liability. Women would be forced to have a hysterectomy or hysterotomy, which places women at significant risk, instead of the other methods of abortion. The treatment of pregnancy loss would be criminalized and women would suffer medical harm for lack of treatment and women would be forced to travel significant distances to obtain a safe abortion elsewhere. (Complaint, ¶¶ 47-49)

This matter is before the Court on various motions filed by the parties: Plaintiffs' Motion to consolidate Motion for Preliminary Injunction and Trial on the Merits; Plaintiffs' Motion for Preliminary Injunction; Defendants' Motion to Dismiss; and, Motion to Intervene. Responses and replies have been filed by the parties. At the hearing, the parties agreed to consolidate the preliminary injunction hearing with

the trial on the merits because only issues of law are before the Court. Fed. R. Civ. P. 65(a)(2). The Court will first address Defendants' Motion to Dismiss before addressing the merits of the case.

II. DEFENDANTS' MOTION TO DISMISS

Rule 12(b)(6) provides for a motion to dismiss for failure to state a claim upon which relief can be granted. This type of motion tests the legal sufficiency of the plaintiff's Complaint. *Davey v. Tomlinson*, 627 F. Supp. 1458, 1463 (E.D. Mich. 1986). In evaluating the propriety of dismissal under Rule 12(b)(6), the factual allegations in the Complaint must be treated as true. *Janan v. Trammell*, 785 F.2d 557, 558 (6th Cir. 1986). If matters outside the pleading are presented in a Rule 12(b)(6) motion, the motion shall be treated as one for summary judgment under Rule 56(b) and disposed of as provided in Rule 56.

Defendants argue that based on the Attorney General's Opinion issued on April 4, 2005, OAG 2005, No. 7174, the Act only applies to the dilation and extraction abortion procedure (D&X), known as partial-birth abortion, and not to constitutionally protected procedures, such as the D&E procedure. Defendants claim that the Attorney General has the authority to direct State and local officials on the proper construction of the Act. The Attorney General's Opinion further affirms the immunity provisions contained in the Act to comport with the constitutional requirements for a maternal health exception as set forth in *Stenberg v. Carhart*, 530 U.S. 914, 938-39 (2000), followed by the Sixth Circuit in *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436, 445 (6th Cir. 2003). The Sixth Circuit held that partial birth abortions could be banned if the statute provides a medical exception that, based on reasonable medical judgment by a physician,

the D&X procedure was necessary to safeguard the mother against significant health risks. *Taft*, 353 F.3d at 445.

Plaintiffs respond, stating that the Attorney General's Opinion is not binding on either the state or federal courts. *See Donahoo v. Household Fin. Corp.*, 472 F. Supp. 353, 355 (E.D. Mich. 1979). Plaintiffs argue that courts have rejected attorney general opinions if the interpretation of the state statute was inconsistent with the plain language of the statute or the intent of the legislature. *See*, *Auto-Owners Ins. Co. v. Budkis*, 575 N.W.2d 79, 81 & n. 1 (Mich. Ct. App. 1997); *Reinelt v. Mich. Pub. Sch. Employees' Ret. Bd.*, 276 N.W.2d 858, 861 (Mich. Ct. App. 1979). In *Stenberg*, Plaintiffs argue that the United States Supreme Court discussed numerous reasons for rejecting the Nebraska attorney general's interpretation because the opinion was not binding on courts, as is the case in Michigan. *Stenberg*, 530 U.S. at 941. Plaintiffs claim that the Attorney General's opinion rewrote the statute, which the Attorney General has no authority to do.

Based on the Supreme Court's ruling in *Stenberg*, "case law makes clear that we are not to give the Attorney General's interpretative views controlling weight." 530 U.S. at 940. The Attorney General's opinion narrows the Act's application to D&X procedures. Nowhere in the language of the Act does it state that the Legislature intended to limit the Act to D&X procedures only. The Act focuses on the "perinate" and any acts by a physician to endanger the "perinate."

The Attorney General's Opinion does not have the authority of ruling on the constitutionality of a statute. *See Cramer v. Vitale*, 359 F. Supp. 2d 621, 628 (E.D. Mich. 2005) (the role of federal courts is to protect constitutional

rights). Even though the Attorney General's Opinion directs the state prosecutors to only apply the statute to D&X procedures, the Opinion does not constitute a ruling on the constitutionality of the Act. The Court cannot accept the Attorney General's opinion as the only interpretation of the Act. The Attorney General's Motion to Dismiss is denied.

III. MERITS OF THE CASE

A. Undue Burden on Right to Reproductive Choice

Plaintiffs state that in *Stenberg* and in *Planned Parenthood v. Casey,* 505 U.S. 833, 846 (1992), the Supreme Court reaffirmed the essential holding of *Roe v. Wade,* that the Constitution protects a woman's right to choose to terminate a pre-viable or non-viable pregnancy. Plaintiffs argue that the Act reaches much more than a single abortion procedure because the Act equates "perinate" with a "legally born person" once any non-severed part is beyond the vaginal opening. The Act, therefore, creates a ban on actions at the heart of abortion procedures from the earliest stages of pregnancy, whether used to perform induced abortions or to treat pregnancy loss.

Plaintiffs submitted the declarations of Michael I. Hertz, M.D., Medical Director of PPSCM, and Stanley M. Berry, M.D., Corporate Chairman of the Department of Obstetrics and Gynecology at William Beaumont Hospital, stating that the Act would ban a physician's ability to perform most abortion procedures based on the definition under the Act. (Hertz Decl., ¶¶ 11, 34-36; Berry Decl. ¶¶ 6-7, 16) The Act implicates the suction curettage, D&E, and induction methods of abortion, without regard to whether the embryo or fetus is intact or viable. (Hertz Decl., ¶¶ 11, 34-36; Berry Decl., ¶¶ 16-18) The Act would be in direct violation of the

Supreme Court precedent in *Stenberg* which noted that a ban on even a single pre-viability abortion procedure can constitute an undue burden on the woman's right to reproductive choice. *Stenberg*, 530 U.S. at 938-46.

Defendants respond that based on the Michigan Attorney General's Opinion, the Act only applies to D&X methods of abortion, which the Sixth Circuit has found to be constitutional. *See Taft*, 353 F.3d at 445. As noted above, the Attorney General's Opinion is not binding on any courts. A reading of the specific language of the Act supports Plaintiffs' arguments in that the Act would ban all pre-viable abortion procedures, including the suction curettage, D&E and induction methods of abortion, which the Supreme Court has found to be safe and that banning such procedures can constitute an undue burden on the woman's right to reproductive choice. *Stenberg*, 530 U.S. at 938-46.

The Act defines a "perinate" as a "live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus [i.e., opening] until the point of complete expulsion or extraction from the mother's body." M.C.L. § 333.1085(d). "Live" is defined as demonstrating one or more of the following: "(i) a detectable heartbeat; (ii) evidence of breathing; (iii) evidence of spontaneous movement; (iv) umbilical cord pulsation." M.C.L. § 333.1085(c). An "anatomical part" as "any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta." M.C.L. § 333.1085(a).

As noted by Dr. Berry in his Declaration, abortion procedures including suction curettage, D&E and induction, entail removal of an embryo or fetus through the woman's

vaginal introitus and these procedures are performed to induce abortion and to treat pregnancy loss. (Berry Decl., ¶ 6) The embryo or fetus is generally living at the beginning of the procedure and the physician knows that by the end of the procedure the embryo or fetus will have died. (Hertz Decl., ¶ 29; Berry Decl., ¶ 14) Generally, the physician's focus is to perform the procedure as safely as possible for the women and ensuring the complete evacuation of the uterus, regardless of which abortion procedure is used. (Hertz Decl., ¶ 29; Berry Decl., ¶ 14) In any of these procedures, a non-severed part of the embryo or fetus with a heartbeat may be "beyond the plane of the vaginal introitus" when the physician takes steps to complete the abortion procedure, and that the physician knows the fetus will not survive at the end of the procedure. (Hertz Decl., ¶¶ 34-36; Berry Decl., ¶¶ 16-18)

The Act does not describe any specific procedure to be banned. The Act also does not distinguish between induced abortion and pregnancy loss. Based on the language of the Act, Plaintiffs have carried their burden to show that the Act creates an undue burden on a woman's right to choose an abortion.

B. Protection of Women's Health

Plaintiffs claim that because the Act fails to protect women's health, therefore, the Act is unconstitutional on its face. They argue that the importance of maternal health is a unifying thread that runs throughout the Supreme Court's abortion decisions, as noted in the recent case, *Stenberg*. *Stenberg*, 530 U.S. at 931 ("a State may promote but not endanger a woman's health when it regulates the methods of abortion"). The Sixth Circuit has concluded that a statute regulating abortion requires a maternal health exception that permits the banned procedure when necessary to prevent a

significant health risk. *Taft,* 353 F.3d at 449. Plaintiffs argue that the Act, which purports to create personhood throughout pregnancy and without regard to fetal viability, lacks an operative health exception. Although the Act contains language that exempts a physician from liability to avert an imminent threat to the physical health of the mother, when any harm to the perinate it not a known result, the Declarations submitted by Plaintiffs show that the harm to the embryo or fetus is always a known result—its death. (Hertz Decl., ¶ 37; Berry Decl., ¶ 24). Plaintiffs claim the health exception under the Act is entirely meaningless.

Again, Defendants do not specifically address this argument, other than noting that based on the Attorney General's Opinion directing the prosecutors to apply the Act to D&X abortions only. Defendants claim that the Sixth Circuit in *Taft* has held that regulation of D&X abortions is constitutional if the statute provides an exception to preserve the life and health of the mother. *Taft,* 353 F.3d at 445. Defendants argue that the Ohio statute addressed in *Taft* contained a maternal health exception based on "reasonable medical judgment" which the Sixth Circuit found to be constitutional. *Id.* at 445.

The Ohio statute contains a medical health exception allowing D&X procedures based on a reasonable medical judgment of a physician that the mother's health and life are in danger. Ohio Rev. Code Ann. § 2919.15(C). The language in the Michigan statute requires the health exception only when a procedure is necessary to "avert an imminent threat to the physical health of the mother, *and* any harm to the perinate was incidental to treating the mother *and* not a known or intended result of the procedure performed." M.C.L. § 333.1083(2)(b)(ii) (emphasis added). This language differs significantly from the Ohio statute found constitutional

by the Sixth Circuit. The Ohio statute does not contain language that the physician must consider the fetus' health, whereas the Michigan statute expressly notes that the physician must consider harm to the perinate. The Ohio statute does not contain any language stating that the D&X procedure could not be performed if the physician had knowledge of the intended harm to the perinate. The Michigan statute expressly notes that the physician may only consider a procedure if there is an "imminent threat" to the mother's health and the harm to the perinate is "not a known or intended result" of the procedure performed. M.C.L. § 333.1083(2)(b)(ii). Plaintiffs argue that physicians always know the outcome of the procedure. They support their argument by submitting the Declarations stating that the harm to the embryo or fetus is always a known or intended result of every abortion. ((Hertz Decl., ¶ 37; Berry Decl., ¶ 24).

Plaintiffs have shown that the health exception of the Act is not the same as the language in the Ohio statute found to be constitutional by the Sixth Circuit. Plaintiffs have carried their burden that the health exception provision of the Act is meaningless because physicians always know the intended harm and result of every abortion.

C. Life Exception

Plaintiffs argue that the Act's life exception is also constitutionally inadequate. Defendants claim that the Act is constitutional because the Michigan Attorney General's Opinion specifically applies the Act to D&X procedures only.

The Act insulates physicians from liability if a procedure is "necessary ... to save the life of the mother *and* every reasonable effort was made to preserve the life of both the mother and the perinate." M.C.L. § 333.1083(2)(b)(i). The

Declarations submitted by Plaintiffs state that a requirement that a physician attempt to sustain the life of an embryo or pre-viable fetus, which has no chance of survival outside of the uterus, is irrational and further jeopardizes the woman's life. (Hertz Decl.; ¶ 40; Berry Decl., ¶ 27) The Supreme Court in *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747 (1986) stated that where there no chance of survival outside of the uterus, a requirement that a physician attempt to sustain the life of an embryo or pre-viable fetus is irrational. *Thornburgh,* 476 U.S. at 768-69. The Supreme Court has also held that the requirement that a physician balance the interests of the woman against the embryo or pre-viable fetus is impermissible. *Id.* at 768. The language in this Act which absolves a physician from liability only if the procedure is "necessary" to save the life of the mother "and" every reasonable effort was made to preserve the life of "both" the mother and the perinate essentially requires the physician to balance the interests of the woman and the "perinate." This requirement is unconstitutional under *Thornburgh.*

Plaintiffs have shown that the life exception under the Act is unconstitutional. Based on *Thornburgh,* the requirement in the Act which requires the physician to balance the interests of the woman against the "perinate" is unconstitutional on its face.

D. Void for Vagueness

Plaintiffs finally argue that the Act is unconstitutionally vague in violation of the Fourteenth Amendment's Due Process Clause because the Act is confusing and ambiguous. Plaintiffs claim that the Act does not specify what medical procedures are banned and fails to set forth specific penalties for violations of its terms. Plaintiffs argue that the Act bans

a wide range of medically safe procedures. The Act's definition of the term "perinate" as a legally born person is contradicted by the medical community's understanding of when a fetus is born. Plaintiffs claim that in the medical community, a fetus is not born until it is fully outside of the woman's body. (Berry Decl., ¶ 20) Plaintiffs also argue that the Act's "health exception" is a nullity and its own terms confusing. The Act's requirement that there must be an "imminent threat" to a woman's physical health is confusing in that the Act does not define what constitutes an imminent threat. (Berry Decl., ¶ 25) This requires that a physician must wait until medical harm is imminent before their actions would be exempted under the Act. (Hertz Decl., ¶ 38; Berry Decl., ¶ 25) The requirement to save a woman's life only if the physician has made every reasonable effort to preserve the life of the perinate is vague because the term "reasonable effort" is not defined and there are no circumstances where an embryo or pre-viable fetus would be able to survive outside the woman's uterus. (Hertz Decl., ¶ 40; Berry Decl., ¶¶ 16, 27)

Defendants rely on their argument that the Michigan Attorney General's Opinion cures any vagueness argument by Plaintiffs.

A statute is unconstitutionally vague and in violation of the Fourteenth Amendment's Due Process Clause if the statute conditions potential liability on confusing and ambiguous criteria which presents serious problems of notice and discriminatory application. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979). A statute is unconstitutionally vague if it threatens to inhibit the exercise of constitutionally protected rights and subjects individuals to criminal penalties. *Colautti*, 439 U.S. at 391; *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8 (1983). Plaintiffs have shown that the Act is vague because

it does not specify what medical procedures are banned and does not set forth specific penalties for violations of its terms. Plaintiffs have shown that the definition of the term "perinate" is not a commonly used definition within the medical community. As to the Act's health exception, the language is confusing in that the terms "imminent threat" and "every reasonable effort" (to preserve the life of the perinate) are not defined and require a physician to wait until the woman is in "imminent" danger before performing any medical procedure. As supported by Plaintiffs, there is no circumstance which allows an embryo or a pre-viable fetus to be able to survive outside the woman's uterus.

Plaintiffs have shown that the Act is confusing and vague and does not place the physicians on notice regarding what actions on their part will constitute a violation of the Act. Plaintiffs have carried their burden that the language in the Act is void for vagueness and, therefore, is unconstitutional.

IV. MOTIONS TO INTERVENE

Two parties seek to intervene in this case. The organization called Standing Together To Oppose Partial-birth-abortion ("STTOP") seeks intervention as a defendant in this case under Fed.R.Civ.P. 24(a), as a matter of right, or alternatively, under Rule 24(b), for permissive intervention. STTOP is an organization created by the Right to Life of Michigan organization to specifically enact certain legislation opposing abortions. Plaintiffs oppose STTOP's intervention in this case but does not oppose granting STTOP *amici* status. Marty Jo Fleser and Mark Robinson, Chair and Vice-Chair of the Choose Life Caucus of the Michigan Democratic Party, seek to intervene as *amici curiae* only. No opposition has been filed to this motion.

Rule 24 allows intervention as of right or by permission in an "action" before the district court. *See* Fed.R.Civ.P. 24(a) and (b). Rule 24(a) states:

> Upon timely application, anyone shall be permitted to intervene in an action ... when the applicant claims that the interest relating to the property ... which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter ... impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). Four criteria must be met for intervention as a matter of right: 1) the application is timely; 2) the party must have a substantial legal interest in the case; 3) the party must demonstrate that its ability to protect that interest will be impaired in the absence of intervention; and, 4) there must be inadequate representation of that interest by the current party. *See Michigan State v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). If any of these criteria are not satisfied, a motion to intervene must be denied. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 471 (6th Cir. 2000).

As to the first factor, STTOP's motion was timely since it was filed immediately after the case was filed.

Regarding the second factor, STTOP argues it has expended time, effort and resources to ensure the enactment of the Act and, therefore, it has a vested interest in ensuring the constitutionality of the Act. The Sixth Circuit has limited intervention as of right to membership organizations, longstanding organizations with missions broader than the enactment of a single piece of legislation. *See, County Sec. Agency v. Ohio Dep't of Commerce*, 296 F.3d 477 (6th Cir.

2002). STTOP appears to be a "ballot question committee," not a longstanding organization with a broader mission than to enact a single piece of legislation. STTOP's interest is a generalized interest in one issue. Those supporting a certain legislation, including legislators, have been denied intervention because individual legislators who voted for the enactment of certain legislation do not have standing to challenge the constitutionality of an enacted legislation. *See, Planned Parenthood v. Ehlmann*, 137 F.3d 573, 578 (8th Cir. 1998). Anti-abortion groups are not traditionally permitted to intervene in constitutional challenges to state and local laws regulating abortion. *See, Diamond v. Charles,* 106 S. Ct. 1697, 1705 (1986). STTOP is unable to meet the second criteria.

Addressing the third and fourth criteria, although STTOP argues that the Attorney General is unable to fully protect their interest, there is no dispute that the Attorney General is charged with defending the interests of Michigan citizens and defending any acts enacted by the legislature. *See, Keith v. Louisiana Dep't of Education,* 93 F.R.D. 820 at 823. The Attorney General in this case has submitted various briefs and has urged the Court to dismiss the matter. STTOP has not shown that the Attorney General is unable to fully protect their interest in the litigation.

Permissive intervention is discretionary under Rule 24(b). Plaintiffs have submitted various documents showing that the Right to Life of Michigan is openly hostile to Plaintiffs. Plaintiffs claim that based on STTOP and the Right to Life of Michigan's ideological goals, its presence would seriously delay the adjudication and resolution of the matter since other issues would be raised by STTOP. Because the Attorney General has fully litigated the constitutional issue before the

Court, permissive intervention will not be allowed in this case.

Plaintiffs do not oppose participation by STTOP as *amicus curiae*. The Court considers STTOP and Fleser and Robinson's papers filed as *amici* briefs.[1] Although STTOP seeks additional time to file a brief in opposition to Plaintiffs' Motion for Preliminary Injunction, because the Court has denied STTOP's Motion to Intervene as a party in this case and the parties have agreed to consolidate the preliminary injunction hearing with a hearing on the merits of the case, any additional briefs on the Motion for Preliminary Injunction are not required.

V. CONCLUSION

The Court declares that the Michigan statute, known as the Legal Birth Definition Act, M.C.L. § 333.1081 *et seq.*, is unconstitutional. As more fully set forth above, the Act places an undue burden on the woman's right to reproductive choice, fails to contain language protecting the health of the pregnant woman, contains a life exception language which is constitutionally inadequate and includes language which is unconstitutionally vague.

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[1] On May 17, 2005, Plaintiffs submitted a Notice of Filing attaching a brochure by the Right to Life of Michigan, "You're Being Robbed." This is to support Plaintiffs' claim that STTOP, a part of the Right to Life of Michigan, is essentially a fund-raising organization. In response, STTOP opposes the "Notice" stating it is untimely filed and not pertinent. It is noted that the brochure had no bearing on the Court's analysis regarding the intervention motion.

Accordingly,

IT IS ORDERED that Defendants' Motion to Dismiss **(Docket No. 19, filed April 11, 2005)** is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for an Order to Consolidate Hearing on Motion for Preliminary Injunction with a Final Hearing on the Merits **(Docket No. 37, filed June 2, 2005)** is GRANTED, as agreed to by the parties at the hearing.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Preliminary Injunction **(Docket No. 3, filed March 1, 2005)** is MOOT, the Court having ruled on the merits of the case.

IT IS FURTHER ORDERED that STTOP's Motion to Intervene **(Docket No. 10, filed March 16, 2005)** is DENIED; however, the papers filed are received as *amici curae* briefs.

IT IS FURTHER ORDERED that Fleser and Robinson's Motion to Intervene as *amici* **(Docket No. 42, filed June 2, 1005)** as to any papers already filed is GRANTED.

IT IS FURTHER ORDERED that STTOP's Motion to File Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction **(Docket No. 45, filed June 16, 2005)** is DENIED.

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: September 12, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 05-CV-70779

[Filed September 12, 2005]

NORTHLAND FAMILY PLANNING CLINIC, INC., *et al.*,
Plaintiffs,

v.

MICHAEL A. COX, Attorney General of the State of Michigan, *et al.*,
Defendants.

JUDGMENT

In accordance with the Memorandum Opinion and Order entered this date;

Accordingly, judgment is entered in favor of Plaintiffs and against Defendants.

DAVID J. WEAVER
CLERK OF COURT

Approved:

By: s/ Wm. F. LEWIS
Deputy Clerk

/s/ DENISE PAGE HOOD

DENISE PAGE HOOD
United States District Judge
DATED: September 12, 2005
Detroit, Michigan

APPENDIX C

UNITED STATED DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 2:05 CV 70779

[Filed March 16, 2005]

NORTHLAND FAMILY PLANNING CLINIC, INC.; NORTHLAND FAMILY PLANNING CLINIC, INC. - WEST; NORTHLAND FAMILY PLANNING CLINIC, INC. - EAST; SUMMIT MEDICAL CENTER, INC.; PLANNED PARENTHOOD MID-MICHIGAN ALLIANCE; and PLANNED PARENTHOOD OF SOUTH CENTRAL, MICHIGAN, on behalf of themselves and their physicians, staff and patients; and STANLEY M. BERRY, M.D.; TIMOTHY R.B. JOHNSON, M.D.; KAROLINE S. PUDER; M.D.; and RONALD C. STRICKLER, M.D., on behalf of themselves and their patients,

Plaintiffs,

v.

MICHAEL A. COX, Attorney General of the State of Michigan, in his official capacity; and

KIM L. WORTHY, Prosecuting Attorney for Wayne County, in her official capacity, individually and as representative of a class of similarly situated prosecuting attorneys,

Defendants,

STANDING TOGETHER TO OPPOSE PARTIAL-BIRTH-ABORTION ("STTOP"),

Applicant for Intervention.

ANSWER IN INTERVENTION

INTRODUCTION

Michigan Public Act 135 of 2004, known as the "Legal Birth Definition Act," which Plaintiffs are challenging in their Complaint, was enacted pursuant to Article II, § 9 of the Michigan Constitution. Applicant for Intervention Standing Together To Oppose Partial-birth-abortion (hereinafter "STTOP"), a ballot question committee formed by Right to Life Michigan, Inc. and registered with the Michigan Department of State pursuant to the Michigan Campaign Finance Act, played a crucial role in enacting this citizen-initiated legislation. STTOP initiated the petition process, drafted the language contained in the petition, presented the initiative petition to the Secretary of State and the Board of State Canvassers for approval of its form, and acquired nearly 460,000 signatures in support of this petition. Indeed, the efforts of STTOP were critical to the enactment of the Legal Birth Definition Act. Therefore, STTOP has a vested interest in upholding the constitutionality of the Legal Birth Definition Act.

Additionally, STTOP has a substantial interest in the protection and preservation of human life, which includes protecting and promoting the health, welfare and safety of all persons, including perinates.

STTOP, by and through its undersigned counsel, hereby Answer Plaintiffs' Complaint as follows:

RESPONSE TO PLAINTIFFS' ALLEGATIONS

I. Introductory Statement

1. Admitted.

2. Admit that the Legal Birth Definition Act speaks for itself. Except as admitted, the allegations of paragraph 2 are denied.

3. Denied.

4. Denied.

II. Jurisdiction and Venue

5. Admitted.

6. Admitted.

7. Admitted.

III. Parties

A. Plaintiffs

8-15. STTOP is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraphs 8 through 15. Insofar as the allegations of these paragraphs seek to interpret the application of the Legal Birth Definition Act, STTOP affirmatively alleges that the Legal Birth Definition Act speaks for itself. STTOP specifically denies that the suction curettage, dilation and evacuation ("D&E"), and induction procedures are prohibited by the Legal Birth Definition Act. Except as admitted, the allegations of paragraphs 8 through 15 are denied.

B. Defendants

16. Admitted upon information and belief.

17. Admitted upon information and belief.

18-23. The averments set forth in paragraphs 18 through 23 constitute conclusions of law, which are denied upon information and belief.

IV. The Statutory Framework

24-32. Insofar as the allegations of these paragraphs seek to interpret the application of the Legal Birth Definition Act, STTOP affirmatively alleges that the Legal Birth Definition Act speaks for itself. Except as admitted, the allegations of paragraphs 24 through 32 are denied.

V. The Act's Effect On Women's Health and Access to Abortion and Other Services

33. Denied.

34. STTOP admits that the majority of first and second trimester abortions are performed using surgical methods. STTOP admits that "suction curettage" is a first trimester abortion procedure. STTOP admits that "dilation and evacuation" or "D&E" is a second trimester abortion procedure. STTOP admits that some first and second trimester abortions are performed by administering medications. STTOP further admits that abortion by abdominal surgery (hysterectomy or hysterotomy) is extremely rare and has different risk factors than other first or second trimester abortion procedures. STTOP is without knowledge or information sufficient to form a belief as to the truth of the additional averments set forth in paragraph 34. Except as admitted, the allegations of paragraph 34 are denied.

35. Denied upon information and belief.

36. Admitted.

37. STTOP is without knowledge or information sufficient to form a belief as to the truth of the averments set for in paragraph 37. Insofar as the averments allege that "suction curettage" is prohibited by the Legal Birth Definition Act, they are denied.

38. STTOP is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 38. Insofar as the averments allege that the D& E procedure is prohibited by the Legal Birth Definition Act, they are denied.

39. STTOP is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 39. Insofar as the averments allege that the

induction procedure is prohibited by the Legal Birth Definition Act, they are denied.

40. STTOP is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 40. Insofar as the averments allege that suction curettage, D& E, and induction are prohibited by the Legal Birth Definition Act, they are denied.

41. STTOP is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 41. Insofar as the averments allege that a hysterectomy and a hysterotomy are not prohibited by the Legal Birth Definition Act, they are admitted. Except as admitted, the allegations of paragraph 41 are denied.

42. Denied.

43. STTOP is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 43. Insofar as the averments allege that the Legal Birth Definition Act criminalizes "certain actions and omissions on a doctor's part when delivering a fetus at term," STTOP affirmatively alleges that the Legal Birth Definition Act speaks for itself. Except as admitted, the allegations of paragraph 43 are denied.

44. STTOP affirmatively alleges that the Legal Birth Definition Act speaks for itself. Insofar as the averments allege that the Legal Birth Definition Act endangers the lives and health of pregnant women, they are denied. Except as admitted, the allegations of paragraph 44 are denied.

45. STTOP affirmatively alleges that the Legal Birth Definition Act speaks for itself. STTOP denies that the

Legal Birth Definition Act "criminalizes a broad range of procedures and actions physicians regularly perform during virtually any common method of pre-viability abortion, as well as certain obstetrical procedures, leaving physicians to guess as to what procedures or actions are encompassed by the Act." STTOP denies that the Legal Birth Definition Act is "unclear." STTOP denies that "physicians cannot know what the Act means by its requirement that the physician make 'every reasonable effort'" to preserve the life of both the mother and the perinate when taking action necessary to save the life of the mother. STTOP further denies that the Legal Birth Definition Act "fails to give adequate notice to physicians of what procedures or actions will subject them to liability." Except as admitted, the allegations of paragraph 45 are denied.

46. Denied.

47. Denied.

48. STTOP is without knowledge or information sufficient to form a belief as to the truth of the averments set forth in paragraph 48. Insofar as these averments are to be read in conjunction with the allegations of paragraph 47, they are denied.

49. Denied.

50. Denied.

VI. Injunctive Relief

51. Denied.

First Claim for Relief

52. STTOP hereby incorporates its answers to paragraphs 1 through 51 above.

53. Denied.

Second Claim for Relief

54. STTOP hereby incorporates its answers to paragraphs 1 through 53 above.

55. Denied.

Third Claim for Relief

56. STTOP hereby incorporates its answers to paragraphs 1 through 55 above.

57. Denied.

Fourth Claim for Relief

58. Denied.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted such that the Complaint must be dismissed pursuant to Fed. R. Cir. P. 12(b)(6), and Plaintiffs lack standing such that dismissal is appropriate pursuant to Fed. R. Civ. P. 12(b)(1).

WHEREFORE, STTOP respectfully requests that the Court enter an order and judgment:

A. Denying Plaintiffs the relief they seek and dismissing this action with prejudice;

and

B. Awarding STTOP its attorneys' fees and costs incurred in connection with this action as authorized by law.

Respectfully submitted this 16th day of March, 2005.

s/Robert J. Muise
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APPENDIX D

Michigan Legal Birth Definition Act states:

Sec. 3.

(1) A perinate shall be considered a legally born person for all purposes under the law.

(2) A physician or an individual performing an act, task, or function under the delegatory authority of a physician is immune from criminal, civil, or administrative liability for performing any procedure that results in injury or death of a perinate while completing the delivery of the perinate under any of the following circumstances:

(a) If the perinate is being expelled from the mother's body as a result of a spontaneous abortion.

(b) If in that physician's reasonable medical judgment and in compliance with the applicable standard of practice and care, the procedure was necessary in either of the following circumstances:

(i) To save the life of the mother and every reasonable effort was made to preserve the life of both the mother and the perinate.

(ii) To avert an imminent threat to the physical health of the mother, and any harm to the perinate was incidental to treating the mother

and not a known or intended result of the procedure performed.

M.C.L. § 333.1083.

The Act contains the following definitional section:

Sec. 5. As used in this act:

(a) "Anatomical part" means any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta.

(b) "Imminent threat to the physical health" means a physical condition that if left untreated would result in substantial and irreversible impairment of a major bodily function.

(c) "Live" means demonstrating 1 or more of the following biological functions:

(i) A detectable heartbeat.

(ii) Evidence of breathing.

(iii) Evidence of spontaneous movement.

(iv) Umbilical cord pulsation.

(d) "Perinate" means a live human being at any point after which any anatomical part of the human being is known to have passed beyond the plane of the vaginal introitus until the point of complete expulsion or extraction from the mother's body.

(e) "Physician" means an individual licensed by the state to engage in the practice of medicine or osteopathic medicine and surgery under article 15 of the public health code.

M.C.L. § 333.1085.

The legislative findings were codified as follows:

(a) That in *Roe v. Wade* the United States supreme court declared that an unborn child is not a person as understood and protected by the constitution, but any born child is a legal person with full constitutional and legal rights.

(b) That in *Roe v. Wade* the United States supreme court made no effort to define birth or place any restrictions on the states in defining when a human being is considered born for legal purposes.

(c) That when any portion of a human being has been vaginally delivered outside his or her mother's body, that portion of the body can only be described as born and the state has a rational basis for defining that human being as born and as a legal person.

(d) That the state has a compelling interest in protecting the life of a born person.

M.C.L. § 333.1082.

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No. 07-291

FILED
NOV 5 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STANDING TOGETHER TO OPPOSE
PARTIAL-BIRTH-ABORTION,

Petitioner,

—v.—

NORTHLAND FAMILY PLANNING CLINIC, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether this Court should review the Sixth Circuit's determination that an initiative petition committee created solely to advocate for the passage of Michigan's Legal Birth Definition Act lacked a substantial legal interest to justify intervention as of right in a suit challenging the constitutionality of the Act?

RULE 29.6 DISCLOSURE

None of the Respondents in this action has a parent corporation or any stock owned by publicly held corporations.

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Petitioner has unsuccessfully sought to intervene at every stage of these proceedings. Its motion was properly denied by both courts below. That case management decision plainly does not warrant review by this Court.

STATEMENT OF THE CASE

The underlying dispute in this case involves a challenge to Michigan's "Legal Birth Definition Act" (codified at Mich. Comp. Laws §§ 333.1081-333.1085) ("the Act"). The Act was vigorously defended by the State and declared unconstitutional by the Sixth Circuit.[1] Petitioner has no role in enforcing the Act and does not contend that it is subject to the Act's terms. Petitioner nonetheless claims that it is entitled to intervene as of right solely because it organized a petition drive that played a role in the Act's eventual passage.

The language now embodied in the Act was originally passed by the Michigan Legislature in September 2003 as Senate Bill 395, but then vetoed by the Governor because "it easily could be interpreted to outlaw even first trimester abortions" and because it failed to contain "a valid [health] exception." Michigan Journal of the Senate, No. 84

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[1] Michigan has filed its own Petition for Certiorari in *Cox v. Northland Family Planning, Inc.* (07-313). The only question presented by that petition is whether the Sixth Circuit abused its discretion in declining to seek an interpretation of the Act from the state supreme court through the certification process after concluding that the Act was not reasonably susceptible to a constitutional construction.

at 1835.[2] Thereafter, Michigan Right to Life formed Petitioner, Standing Together To Oppose Partial-birth-abortion ("STTOP"), for the sole purpose of attempting to pass the identical language contained in Senate Bill 395 by "initiative petition." Pet. App. 37a. The initiative petition process allows citizens to place proposed legislation directly before the legislature after collecting the requisite number of signatures. Mich. Const. Art. II, § 9. Any legislation introduced by initiative petition need only pass by a simple majority of the Legislature, at which point it becomes law without the Governor's signature. *Id.* STTOP collected the requisite number of signatures and submitted the initiative petition to the Legislature, which passed it in 2004.[3]

Before the effective date of the Act, Respondents challenged the law and STTOP sought to intervene under Fed. R. Civ. P. 24(a) and (b). The district court denied STTOP's motion to intervene as of right under Rule 24(a) on two grounds. First, the district court held that STTOP lacked an interest in the case. Second, the district court ruled that, even if STTOP had an interest in the litigation, its interest was fully and adequately protected by the Attorney

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[2] Available at http://www.legislature.mi.gov/(S(1ktqfb55fzikyx55woqbm555))/documents/2003-2004/Journal/Senate/pdf/2003-SJ-10-14-084.pdf.

[3] Had the Legislature amended, or simply not acted on, the bill, the initiative would have gone to the voters. Because the Legislature did pass it (a foregone conclusion inasmuch as the Legislature had just passed the identical bill), it never appeared on a ballot. Thus, although STTOP refers to itself as a "ballot question committee," Pet. Br. at i, the term "initiative petition committee" is more accurate.

General. Pet. App. 59a-60a. The district court also denied STTOP's motion for permissive intervention under Rule 24(b) noting, *inter alia*, that STTOP's "presence [in the litigation] would seriously delay the adjudication and resolution of the matter." *Id.* at 60a-61a.

The Sixth Circuit affirmed. Like the district court, the Sixth Circuit held that STTOP lacked a substantial legal interest in the case. The Sixth Circuit noted that STTOP's sole purpose was to get the legislation passed, and that STTOP "[was] not itself regulated by any of the statutory provisions at issue here." *Id.* at 37a. The Sixth Circuit also held that STTOP's "legal interest can be said to be limited to the passage of the Act rather than the state's subsequent implementation and enforcement of it." *Id.* The Sixth Circuit distinguished other cases relied on by STTOP on the grounds that they involved situations in which public interest groups were allowed to intervene in a challenge to "the *procedure* required to pass a particular" law via mechanisms such as initiative petitions. *Id.* at 37a-38a. Having concluded that STTOP lacked a substantial legal interest in the case, the court determined that it did not need to "address the other elements of intervention." *Id.* at 39a. Finally, the Sixth Circuit affirmed the denial of permissive intervention, holding that the district court did not abuse its discretion given that the record and STTOP's brief evinced an "ideological approach to the litigation rather than attempting to argue for the

Act's validity under the relevant Supreme Court precedent."[4] *Id.* at 39a-40a.

REASONS FOR DENYING THE WRIT

The Court should decline to review this case for three reasons. First, STTOP is essentially asking this Court to issue an advisory opinion on the relationship between Article III and Rule 24. Specifically, according to STTOP, there is a conflict among the circuits as to whether a proposed intervenor must establish Article III standing in addition to a substantial legal interest or whether intervention is warranted if the proposed intervenor has a substantial legal interest in the outcome of the litigation, regardless of Article III standing. Resolution of any conflict would have no bearing on the outcome of this case, however, because STTOP's intervention motion was denied under the more relaxed standard.

Second, review is not warranted because the Sixth Circuit's decision is both amply supported by the record and consistent with the approach followed by other courts of appeals. *See* Sup. Ct. R. 10(a). The Sixth Circuit properly distinguished other cases in which groups intervened because they were regulated by the challenged law, or, in the case of initiative sponsors, where the underlying lawsuit challenged the initiative *process*. *See* Pet. App. 37a-

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[4] STTOP has waived its right to seek review of the denial of permissive intervention. *See* Pet. Br. at i; Sup. Ct. R. 14.1(a); *Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32-33 (1993) (per curiam).

38a. As the Sixth Circuit correctly determined, STTOP demonstrated *none* of these criteria.

Third, this Court has long held that intervention decisions are properly left to the judgment of the lower courts. Because the Sixth Circuit applied well settled principles to the specific facts presented by STTOP's motion, further review is not warranted here. *See* Sup. Ct. R. 10(c). Accordingly, the petition for a writ of certiorari should be denied.

I. This Court Should Decline STTOP's Invitation to Issue What Amounts to an Advisory Opinion on Whether Article III Standing Is Necessary to Intervene as of Right.

This case is an inappropriate vehicle to resolve any purported conflict among the circuits as to whether a proposed intervenor must demonstrate Article III standing, *see* Pet. Br. at 11-13, for the simple reason that STTOP was not required to satisfy Article III standing. Rather, STTOP's motion to intervene as of right under Rule 24(a) was denied by the Sixth Circuit because STTOP failed to establish a substantial legal interest in the litigation. STTOP's contention that intervention should not depend on Article III standing is therefore purely academic. Even if this Court agreed, it would not alter the outcome of this case. As such, STTOP seeks what is tantamount to an advisory opinion from this Court, and its petition should therefore be denied. *See Presier v. Newkirk*, 422 U.S. 395, 401 (1975) ("[A] federal court has neither the power to render advisory opinions nor 'to decide questions that cannot

affect the rights of litigants in the case before them'") (internal citations omitted); *Conway v. Ca. Adult Auth.*, 396 U.S. 107, 110 (1969) (holding that "were [the Court] to pass upon the purely artificial . . . issue tendered by the petition for certiorari [it] would not only . . . be rendering an advisory opinion, but also . . . an unjustifiable intrusion upon the time of this Court"); *cf. Montana v. Imlay*, 506 U.S. 5, 6 (1992) (Stevens, J. concurring) (concurring in dismissal of writ of certiorari as improvidently granted where, regardless of which party prevailed, prisoner's sentence would not change).[5]

II. The Intervention Denial in This Case Is Both Amply Supported By the Record and Consistent With Other Circuits.

The Sixth Circuit's determination that STTOP lacked a substantial legal interest was based on two criteria: first, because STTOP would not be regulated in any manner by the challenged Act, its interest in the litigation was purely ideological; second, the underlying litigation did not concern the *procedure* by which STTOP sought to place the initiative before

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[5] STTOP's suggestion that the Court should review this case to limit forum shopping is likewise without merit. *See* Pet. Br. at 10 (arguing that inconsistent standards for intervention encourage forum shopping by plaintiffs who anticipate intervention requests). In fact, it is difficult to imagine a scenario in which a challenge to the constitutionality of a state law would be brought in any state other than the one in which the law was enacted. This was certainly the case below, where Respondents appropriately challenged the Act in federal district court in Michigan.

the Legislature.[6] Pet. App. 37a-38a. Neither conclusion is subject to serious question on this record. *See id.* Moreover, the criteria applied by the Sixth Circuit are consistent with criteria applied by other circuits under Rule 24(a).[7]

For example, other circuits have repeatedly held that public interest groups that hold a purely ideological interest in the subject matter of a lawsuit are not entitled to intervention as of right, and have distinguished, as the Sixth Circuit did here,

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[6] The sole question before this Court concerns whether STTOP had a substantial legal interest entitling it to intervene. *See* Pet. App. i. Though much of STTOP's brief seems to focus on whether its interests were adequately represented by the Attorney General, *see* Pet. Br. at 5-6, 11 n.4, this issue was not reached by the Sixth Circuit, *see* Pet. App. 39a. The district court, however, concluded that STTOP failed to meet its burden of proving that "the Attorney General is unable to fully protect [its] interest in the litigation," Pet. App. 60a, which alone justifies the denial of the motion to intervene.

[7] Additionally, STTOP mischaracterizes the Sixth Circuit's decision as creating an "ironic" hierarchy of interests protected by Rule 24. *See* Pet. Br. at 13-14. STTOP improperly conflates the general idea of a "significant" interest with the standard of a "substantial *legal* interest" required under Rule 24. *See* Pet. App. 39a; *cf. Diamond v. Charles*, 476 U.S. 54, 75-76 (1986) (O'Connor, J. concurring) (noting that intervenor, a physician opposed to abortion, lacked an interest in the enforcement of an abortion regulation sufficient to warrant intervention); *Donaldson v. United States*, 400 U.S. 517, 531 (1971) (holding that taxpayer lacked an interest sufficient to intervene in proceeding ordering his former employer to disclose his tax records), *superseded on other grounds by statute*, Tax Reform Act of 1976, 27 U.S.C. § 7609(b) (1976). Intervention does not turn on the significance of the intervenor's interest, as STTOP suggests, but on the relationship between this interest and the specific claims at issue in the case.

intervention by those public interest groups that are regulated, or whose members are directly affected, by a challenged statute. *Compare Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (holding that Rule 24 does not allow anti-abortion lobbying group "to intervene in every lawsuit involving abortion rights or to forever defend statutes it helped to enact"), *and Westlands Water Dist. v. United States*, 700 F.2d 561, 563 (9th Cir. 1983) (environmental group's interest in protecting water quality was too general and therefore insufficient to warrant intervention because such an interest was shared by "a substantial portion of the population of northern California") (internal citations omitted), *and Athens Lumber Co., Inc. v. FEC*, 690 F.2d 1364, 1366 (11th Cir. 1982) (finding union's interest in campaign finance reform too generalized to support intervention to defend limits on corporate expenditures), *with Coal. for Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of the Interior*, 100 F.3d 837, 839, 841-42 (10th Cir. 1996) (holding that wildlife photographer and naturalist who had previously sought out and photographed endangered owl, and had successfully filed suit in the past to guarantee its protection, demonstrated legally protectable interest in maintaining its protected status), *and Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (granting intervention as of right to environmental group that had "direct contact with the environmental subject matter threatened by an adverse decision"), *and In re Sierra Club*, 945 F.2d 776, 779-81 (4th Cir. 1991) (holding that environmental group that was party to ongoing administrative proceedings concerning disposal of hazardous waste had sufficient interest to

support intervention in lawsuit challenging administrative regulation at issue), *and Planned Parenthood of Minn. v. Citizens for Cmty. Action*, 558 F.2d 861, 869 (8th Cir. 1977) (upholding intervention in action concerning proposed family planning clinic by neighborhood association asserting interest in preserving property values).[8]

The Sixth Circuit also properly acknowledged and distinguished, *see* Pet. App. 37a-38a, rulings by other courts recognizing the right of public interest groups to intervene in a challenge to "the *procedure* required to pass a particular" law. *See, e.g.*,

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[8] STTOP relies in part on *Washington State Bldg. & Constr. Trades v. Spellman*, 684 F.2d 627 (9th Cir. 1982), for the proposition that the Ninth Circuit takes a very liberal approach to intervention. Pet. Br. at 7. However, other Ninth Circuit cases, including those cited by STTOP, require proposed intervenors to make the same showing that the Sixth Circuit required below. *See* discussion *supra* at 8-9 (citing Ninth Circuit cases); *see also Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1485 (9th Cir. 1993) (requiring that "the interest of a would-be intervenor be protected by some law and related to the subject of the litigation") (citing *Donaldson*, 400 U.S. 517); *Portland Audubon Soc. v. Hodel*, 866 F.2d 302, 309 (9th Cir. 1989) (affirming that intervention is not warranted where the underlying litigation "will not affect a statute or regulation governing the applicants' actions, nor will it directly alter contractual or other legally protectable rights of the proposed intervenors") (internal quotations omitted). At best, *Spellman*, and other Ninth Circuit cases that follow it, suggest that the Ninth Circuit has not been consistent in its response to intervention. Such intra-circuit inconsistencies do not warrant plenary review by this Court. *Cf. Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) (holding that "doubt about the respect to be accorded to a previous decision of a different panel [of a court of appeals] should not be the occasion" for the jurisdiction of this Court); Sup. Ct. R. 10.

Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525, 527-28 (9th Cir. 1983) (granting intervention as of right to public interest group involved in administrative process to create conservation area in challenge to *procedure* by which the area was created); *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (granting intervention as of right to public interest group advocating for passage of the Equal Rights Amendment in challenge to *procedure* by which states could ratify the amendment). This case does not present that situation, as the Sixth Circuit correctly observed.[9]

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[9] Contrary to STTOP's contention that the decision below conflicts with other Sixth Circuit decisions, *see* Pet. Br. at 10, that court has consistently denied intervention to parties whose interest was purely ideological or who could not show they were directly affected or regulated by the statute at issue. *Compare Coal. To Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary v. Granholm*, --- F.3d ----, Nos. 06-2653, 06-2656, 2007 WL 2492975 *4-*8 (6th Cir. Sept. 6, 2007) (denying intervention to groups that sponsored ballot question because groups' members were not regulated or affected by the law and had "only general ideological interest" in the suit), *petition for reh'g en banc filed* (Sept. 20, 2007), *and Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005) (holding that proposed intervenor that circulated a referendum petition lacked any substantial legal interest in the law after referendum was held and results were certified), *and Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) (denying intervention in desegregation case to group that lacked any members, including children who were currently enrolled in the public schools), *with Grutter v. Bollinger*, 188 F.3d 394, 397-99 (6th Cir. 1999) (reversing denial of intervention in affirmative action challenge to University of Michigan Law School's admission policies where proposed intervenors were students of various races who expressed intention to apply to law school), *and Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1246-47 (6th Cir. 1997) (granting intervention after weighing a number of

Finally, as the Sixth Circuit noted, "[w]ithout these sorts of limitations on the legal interest required for intervention, Rule 24 would be abused as a mechanism for the over-politicization of the judicial process." Pet. App. 39a. Because STTOP plainly lacked "a substantial legal interest in the outcome of the case," the Sixth Circuit properly refused to grant STTOP's motion for intervention. *Id.*

III. This Court Generally Leaves Intervention Decisions to the Lower Courts and STTOP Points to No Reason Why This Court Should Depart From That Rule Here.

This Court has long recognized that decisions concerning intervention belong to the lower courts and rarely merit further review. *See Mo.-Kan. Pipe Line Co. v. United States*, 312 U.S. 502, 506 (1941) ("[T]he circumstances under which interested outsiders should be allowed to become participants in a litigation is [*sic*], barring very special circumstances, a matter for the nisi prius court"); *see also Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) (same). This Court has also declined to review intervention decisions where, as here, the lower court applied well-settled principles in deciding the specific facts presented by an intervention motion. *See Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33-34 (1993) (per curiam) (declining to review court

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factors, including whether intervenor was directly regulated by statute in question).

of appeals' denial of intervention motion). As a result, the Sixth Circuit's holding raises "a relatively factbound issue which does not meet the standards that guide the exercise of [this Court's] certiorari jurisdiction." *Id.* at 34; *see also id.* at 33 ("While the decision on any particular motion to intervene may be a difficult one, it is always to some extent bound up in the facts of the particular case. Should we undertake to review [the] decision . . . it is unlikely that any new principle of law would be enunciated."). Given that STTOP does not point to anything to suggest that this Court should depart from these rules, certiorari should be denied.

CONCLUSION

For the foregoing reasons, STTOP's petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 5, 2007